

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/201. Definition.

## **POWERS (**

### **1. GENERAL NATURE OF POWERS**

#### **(1) DEFINITION AND CLASSIFICATION**

##### **201. Definition.**

'Power' is a term of art, denoting an authority vested in a person, called 'the donee', to deal with or dispose of property not his own<sup>1</sup>. A power may be created by reservation or limitation; the dealing or disposition may be total or partial, and for the benefit either of the donee or of others; and the property may be real or personal. A power is distinct from the dominion that a man has over his own property<sup>2</sup>.

1 See *Freme v Clement* (1881) 18 ChD 499 at 504. Contrast *Sykes v Carroll* [1903] 1 IR 17.

2 *Re Armstrong, ex p Gilchrist* (1886) 17 QBD 521, CA; *Van Grutten v Foxwell (Third Appeal)* (1901) 84 LT 545, HL; *Stamp Duties Comr v Stephen* [1904] AC 137, PC; *Goatley v Jones, Goatley v Jones (No 2)* [1909] 1 Ch 557; *Re Reeve, Reeve v Reeve* [1935] Ch 110. See also PARA 220 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/202. Modes of classification.

##### **202. Modes of classification.**

Powers are usually classified: (1) in relation to the donee's interest in the property<sup>1</sup>; (2) in relation to the interest conveyed or created<sup>2</sup>; and (3) in relation to the purpose for which the power was created<sup>3</sup>.

1 See PARA 203 post.

2 See PARA 204 post.

3 See PARA 205 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/203. Classification as to donee's interest.

##### **203. Classification as to donee's interest.**

There are three categories in the classification in relation to the donee's interest, namely: (1) powers simply collateral; (2) powers in gross; and (3) powers appendant or appurtenant<sup>1</sup>.

A power simply collateral is a bare power, given to a mere stranger who has no interest in the property to which the power relates<sup>2</sup>.

A power in gross is a power given to a person having an estate or interest in the property to which the power relates but where the estate or interest created by the power is subsequent to and does not affect the estate or interest of the donee of the power<sup>3</sup>. An example is a power given to a tenant for life to jointure and to appoint the estate in remainder to his children<sup>4</sup>.

A power appendant is a power given to a person having an estate or interest in the property to which the power relates such that the exercise of the power overrides and affects the estate or interest of the donee of the power<sup>5</sup>. An example is a power of leasing in possession<sup>6</sup>.

This classification was formerly important for determining whether a donee could release the power<sup>7</sup>, but is now of little value<sup>8</sup>.

1 *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228 at 232-233.

2 *Dickenson v Teasdale* (1862) 1 De G J & Sm 52 at 59-60.

3 *Nottidge v Dering, Raban v Dering* [1909] 2 Ch 647; on appeal [1910] 1 Ch 297, CA.

4 Butler's note to Co Litt 342b.

5 *Re Mills, Mills v Lawrence* [1930] 1 Ch 654, CA; *Penne v Peacock* (1734) Cas temp Talb 41; and see *Edwards v Sleater* (1665) Hard 410; Tudor LC Real Prop 531; *Re D'Angibau, Andrews v Andrews* (1879) 15 ChD 228 at 243, CA, per Brett LJ.

6 Butler's note to Co Litt 342b.

7 See PARA 376 post.

8 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 545, [1990] 1 WLR 1587 at 1613 per Warner J. However, a child's capacity to exercise a power will depend on this classification: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 52.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/204. Classification as to interest conveyed or created.

## **204. Classification as to interest conveyed or created.**

There are three heads in the classification of powers in relation to the interest conveyed or created, namely: (1) common law powers; (2) statutory powers; and (3) equitable powers<sup>1</sup>.

Under a common law power the common law enables the donee to convey or create a legal estate. A power of attorney may confer a common law power<sup>2</sup>.

A statutory power is a power conferred by statute to convey or create a legal estate. Instances are the power of a legal mortgagee to convey the estate vested in the mortgagor<sup>3</sup>, and the power of a receiver of a person suffering from a mental disorder to make or concur in making all requisite dispositions for conveying or creating a legal estate in his name and on his behalf<sup>4</sup>. Since 1925 the only powers over land, whether created by statute or other instrument or implied by law, and whenever created, which can operate at law are the powers vested in a legal mortgagee<sup>5</sup> or in an estate owner in right of his estate, and exercisable by him or by another person in his name and on his behalf. All other powers of appointment over, or powers to convey or charge land, or any interest in land, operate only in equity<sup>6</sup>.

An equitable power is a power which affects the equitable and not the legal estate or interest; no legal estate passes by the execution of the power<sup>7</sup>. However, the legal owner must give effect to the equitable estate or interest of the appointee<sup>8</sup>, and equity will so compel him. Where the appointee is entitled to call for the transfer of a legal estate, the legal owner must complete the appointee's title by such a transfer, as on the exercise of an ordinary power to appoint absolute interests to children in a marriage settlement by which personalty is vested in trustees.

1 Prior to 1926, in addition to other modes, a power might operate under the Statute of Uses (1535) 27 Hen 8 c 10: see Sugden on Powers (8th Edn) 1 et seq. This statute was repealed as from 1 January 1926 (Law of Property Act 1925 s 207, Sch 7 (repealed)), but without affecting its operation in regard to dealings taking effect before that date (s 1(10)).

2 Sugden on Powers (8th Edn) 45. See also AGENCY vol 1 (2008) PARAS 29-30; DEEDS AND OTHER INSTRUMENTS.

3 As to this and other powers vested in a legal mortgagee see MORTGAGE vol 77 (2010) PARAS 224-227, 443 et seq.

4 See the Law of Property Act 1925 s 22(1) (s 22 substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148, Sch 4 para 5(a)). See also MENTAL HEALTH vol 30(2) (Reissue) PARA 687.

5 See MORTGAGE vol 77 (2010) PARA 443 et seq.

6 Law of Property Act 1925 s 1(7). See also s 7(3) (amended by the Criminal Justice Act 1948 s 83, Sch 10); the Law of Property Act 1925 ss 7(4), 8, 9(1), 88(1), 205(1)(v), (x), (xi), (xvi); and the Settled Land Act 1925 ss 24(1), 68(2).

7 *Re Brown, Dixon v Brown* (1886) 32 ChD 597 at 601; *Cloutte v Storey* [1911] 1 Ch 18, CA.

8 See the Law of Property Act 1925 s 3 (as amended); the Settled Land Act 1925 s 16; and REAL PROPERTY vol 39(2) (Reissue) PARA 184 et seq; SETTLEMENTS vol 42 (Reissue) PARA 767 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/205. Classification as to purpose.

## **205. Classification as to purpose.**

There are two heads in the classification of powers in relation to their purpose, namely: (1) administrative or managerial powers; and (2) dispositive powers or powers of appointment.

Administrative or managerial powers are powers given to a person for the purpose of managing either his own or another person's property, such as powers of sale or leasing<sup>1</sup>. The powers of management conferred by statute upon a tenant for life or the trustees of a settlement<sup>2</sup>, upon trustees of land<sup>3</sup>, and upon personal representatives<sup>4</sup>, are dealt with elsewhere in this work. This category also includes powers to appoint to various offices, of which the power of appointing new trustees is of the most general importance<sup>5</sup>.

Dispositive powers, commonly known as powers of appointment, are powers authorising a person to create or dispose of beneficial interests in property. Such powers are usually subdivided into general powers and special powers, but this division is neither precise nor exhaustive<sup>6</sup>, for there are some powers which may be general for some purposes and not for others<sup>7</sup>, or may be regarded as neither general nor special, but as hybrid<sup>8</sup> or intermediate powers<sup>9</sup>. A classification for one purpose is not necessarily decisive or even a guide to the classification for another purpose<sup>10</sup>. A power to appoint by deed or will really constitutes two distinct powers, one exercisable by each type of instrument<sup>11</sup>.

- 1 See PARA 229 et seq post.
- 2 See the Settled Land Act 1925 ss 19, 30 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 750 et seq.
- 3 See the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 6. For the general powers of trustees of land see TRUSTS vol 48 (2007 Reissue) PARA 1035.
- 4 See the Administration of Estates Act 1925 s 39 (as amended); and EXECUTORS AND ADMINISTRATORS.
- 5 See TRUSTS vol 48 (2007 Reissue) PARA 819 et seq.
- 6 *Re Park, Public Trustee v Armstrong* [1932] 1 Ch 580 at 584 per Clauson J.
- 7 Contrast eg *Edie v Babington* (1854) 3 I Ch R 568 with *Re Byron's Settlement, Williams v Mitchell* [1891] 3 Ch 474; and see PARA 207 post.
- 8 See *Re Jones, Public Trustee v Jones* [1945] Ch 105 at 106 per Vaisey J, where a power to appoint limited to persons living at the death of the appointor was held valid; *Re Triffitt's Settlement, Hall v Hyde* [1958] Ch 852, [1958] 2 All ER 299; *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77, [1973] 3 All ER 1 (joint general power); *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202 (power for trustees to appoint to 'such persons' as they appoint); *Re Beatty's Will Trusts, Hinves v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503; and see PARA 207 post.
- 9 This will often be a general power to appoint anyone except certain specified persons: see *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203; *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418, [1971] 3 All ER 433; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.
- 10 *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418 at 427, [1971] 3 All ER 433 at 439 per Megarry J.
- 11 See *Re Penrose, Penrose v Penrose* [1933] Ch 793 at 806.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/206. General and special powers.

## 206. General and special powers.

A general power is a power that the donee may exercise in favour of such person or persons as he pleases, including himself<sup>1</sup> or his executors and administrators<sup>2</sup>. What appears to be a general beneficial power may, as a matter of construction, be a power given by virtue of his office which may only be exercised in a fiduciary capacity<sup>3</sup>. A special power may be exercised only in favour of certain specified persons or classes<sup>4</sup>, such as the donee's children<sup>5</sup> or relations and friends<sup>6</sup>. It is a question of construction whether a power is general or special<sup>7</sup>. A devise on the trusts which another may declare as to his residuary estate gives that other a general power<sup>8</sup>, and a power is not prevented from being general merely because the period of distribution of the fund is postponed<sup>9</sup>. For the purposes of the rule against perpetuities, however, a power exercisable by two or more jointly has been held not to be a general power<sup>10</sup>; and a power exercisable only with the consent of trustees is not general unless the consent is requisite merely to the power being exercised<sup>11</sup>, and not to the selection or approval of the appointee<sup>12</sup>.

1 *Irwin v Farrer* (1812) 19 Ves 86; *Cofield v Pollard* (1857) 3 Jur NS 1203 ('any person or persons, child or children' is general).

2 *Mackenzie v Mackenzie* (1851) 3 Mac & G 559.

- 3 *Re Edwards' Will Trusts, Dalglish v Leighton* [1947] 2 All ER 521; revsd on another point [1948] Ch 440, [1948] 1 All ER 821, CA.
- 4 *Re Dilke, Re Dilke's Settlement Trusts, Verey v Dilke* [1921] 1 Ch 34 at 41-42, CA, per Warrington LJ. Contrast *Re Churston Settled Estates* [1954] Ch 334 at 346-347, [1954] 1 All ER 725 at 733 per Roxburgh J ('the test [of a general power] really is, is there somebody who for all practical purposes can be treated as the owner'). See also *Estate and Succession Duties Comr (Barbados) v Bowring* [1962] AC 171, [1960] 3 All ER 188, PC.
- 5 *Cloves v Awdry* (1850) 12 Beav 604; *Russell v Russell* (1861) 12 I Ch R 377.
- 6 *Re Caplin's Will* (1865) 2 Drew & Sm 527.
- 7 *Re Johnston's Estate* (1922) 56 ILT 153, Ir CA, where a power was held on construction to be special, and any question of fraud on an earlier power under which the power was created was thereby avoided. See also *Eland v Baker* (1861) 29 Beav 137, where general words were held to be limited by the context. There may in fact be two powers: *Bannerman's Trustees v Bannerman* 1915 SC 398.
- 8 *Bristow v Skirrow* (1859) 27 Beav 585; *Bristow v Skirrow* (1870) LR 10 Eq 1.
- 9 *Re Keown's Estate* (1867) IR 1 Eq 372.
- 10 *Re Churston Settled Estates* [1954] Ch 334, [1954] 1 All ER 725; *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77, [1973] 3 All ER 1; and see *Re Watts, Coffey v Watts* [1931] 2 Ch 302; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1091.
- 11 *Re Dilke, Re Dilke's Settlement Trusts, Verey v Dilke* [1921] 1 Ch 34, CA; *Re Phillips, Lawrence v Huxtable* [1931] 1 Ch 347; *Re Joicey, Thompson v Duncan* (1932) 76 Sol Jo 459. See also *Re Triffitt's Settlement, Hall v Hyde* [1958] Ch 852, [1958] 2 All ER 299; *Estate and Succession Duties Comr (Barbados) v Bowring* [1962] AC 171, [1960] 3 All ER 188, PC.
- 12 See *Re Dilke, Re Dilke's Settlement Trusts, Verey v Dilke* [1921] 1 Ch 34 at 41, CA, per Lord Sterndale MR, and at 42 per Warrington LJ. *Re Watts, Coffey v Watts* [1931] 2 Ch 302 may have been decided on this ground; but see *Re Churston Settled Estates* [1954] Ch 334 at 343, [1954] 1 All ER 725 at 730 per Roxburgh J; and *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77, [1973] 3 All ER 1. See also *Re Barker's Settlement, Knocker v Vernon Jones* [1920] 1 Ch 527, where, on construction, a consent for appointment by will was held to be unnecessary.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(1) DEFINITION AND CLASSIFICATION/207. General powers for statutory purposes.

## 207. General powers for statutory purposes.

A bankrupt's estate extends to a power exercisable by him over or in respect of property that is not otherwise in his estate unless the power cannot be exercised for his own benefit<sup>1</sup>. A power to appoint to any save a named person or persons, other than the donee, is a general power within the Administration of Estates Act 1925<sup>2</sup>, which renders property appointed by will under a general power liable for the appointor's debts<sup>3</sup>. Such a power is not, however, within the provision of the Wills Act 1837<sup>4</sup>, by which real and personal property which the testator 'may have power to appoint in any manner he may think proper' passes under a general devise or bequest<sup>5</sup>, nor is a power to appoint before a particular time, or to appoint by will specifically referring to the power<sup>6</sup>. Yet a power to appoint only by will is within this provision<sup>7</sup>, and so is a power to direct by will that a sum of money be raised and paid<sup>8</sup>. Also a power to appoint to any except a specified person will fall within the provision when that person dies or can no longer come into existence<sup>9</sup>.

For the purposes of inheritance tax, there is included in a person's estate any property over which he has a general power to appoint which enables him to dispose of or charge any property, other than settled property, as he thinks fit<sup>10</sup>. Also included is an interest in most pension schemes over which a person has a general power of disposal<sup>11</sup>. For the purposes of

the rule against perpetuities, a power to appoint is treated as a special power unless it can be exercised at all times during its currency by one person, when he is of full age and capacity, in such a way as to transfer the whole interest to himself without the consent of any other person and without complying with any conditions, except formal ones, relating to the mode of exercise<sup>12</sup>.

1 See the Insolvency Act 1986 s 283(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 404.

2 See the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 7; and EXECUTORS AND ADMINISTRATORS.

3 *Edie v Babington* (1854) 3 I Ch R 568. See also *Drake v A-G* (1843) 10 Cl & Fin 257, HL; and note 10 infra. For another example of a general power for this purpose see *Re Phillips, Lawrence v Huxtable* [1931] 1 Ch 347; and PARA 206 note 11 ante.

4 See the Wills Act 1837 s 27; and WILLS vol 50 (2005 Reissue) PARA 460.

5 *Re Byron's Settlement, Williams v Mitchell* [1891] 3 Ch 474; followed in *Re Jones, Public Trustee v Jones* [1945] Ch 105; and see PARA 205 text and note 8 ante.

6 *Phillips v Cayley* (1889) 43 ChD 222, CA; *Re Davies, Davies v Davies* [1892] 3 Ch 63; *Re Tarrant's Trust* (1889) 58 LJ Ch 780. Although not within the provision, such a power may remain a general power: *Re Waterhouse, Waterhouse v Ryley* (1907) 77 LJ Ch 30, CA.

7 *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Re Powell's Trusts* (1869) 39 LJ Ch 188.

8 *Re Jones, Greene v Gordon* (1886) 34 ChD 65; *Re Wilkinson, Thomas v Wilkinson* [1910] 2 Ch 216. Contrast *Re Wallinger's Estate* [1898] 1 IR 139 at 148, Ir CA; *Re Salvin, Marshall v Wolseley* [1906] 2 Ch 459.

9 *Re Byron's Settlement, Williams v Mitchell* [1891] 3 Ch 474 at 480 per Kekewich J; *Re Harvey, Banister v Thirtle* [1950] 1 All ER 491.

10 See the Inheritance Tax Act 1984 s 5(2); and INHERITANCE TAXATION vol 24 (Reissue) PARA 410. As to the former estate duty position see the Finance Act 1894 s 22(2)(a) (repealed); and *Re Penrose, Penrose v Penrose* [1933] Ch 793. See also *Drake v A-G* (1843) 10 Cl & Fin 257, HL (a decision under the Legacy Duty Act 1796 s 7 (repealed)); and *Re Dunbar-Bullar* [1923] 2 IR 143, Ir CA (a decision under the Finance Act 1900 s 12(2) (repealed); and the Finance Act 1907 s 16 (repealed)).

11 See the Inheritance Tax Act 1984 s 151(4); and INHERITANCE TAXATION vol 24 (Reissue) PARA 410. The option to choose capital payable to one's estate instead of a pension payable to a surviving spouse or dependant under a self-employed retirement annuity or approved personal scheme is not included in a person's estate: see s 152 (as amended); and INHERITANCE TAXATION vol 24 (Reissue) PARA 410.

12 See the Perpetuities and Accumulations Act 1964 s 7; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1009, 1091.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/208. Distinction between trusts and powers.

## **(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS**

### **208. Distinction between trusts and powers.**

The distinction between trusts and powers is that, whereas the court will compel the execution of a trust, it cannot compel the execution of a power<sup>1</sup>. However, there are powers which in their nature are fiduciary, in the sense that the donee of the power is a trustee of it, and has a wide enough interest to allow the exercise of the power. These powers may be called 'fiduciary powers', or sometimes they are confusingly called 'powers in the nature of a trust'. Powers

which are not fiduciary are often called bare powers. The court does not allow the non-execution of fiduciary powers to defeat the donor's intention<sup>2</sup>. Where a testator empowered his trustees to appoint a life interest to his daughter's husband if she married with their consent, her husband has been held entitled to the life interest even if she married without their consent, but with the testator's consent or subsequent acquiescence, and the trustees failed to appoint<sup>3</sup>.

1 See further PARA 286 post.

2 *Harding v Glyn* (1739) 1 Atk 469; 2 White & Tud LC (9th Edn) 285; *Maddison v Andrew* (1747) 1 Ves Sen 57; *Richardson v Chapman* (1760) 7 Bro Parl Cas 318, HL; *Pierson v Garnet* (1786) 2 Bro CC 38 (on appeal (1787) 2 Bro CC 226); *Brown v Higgs* (1803) 8 Ves 561, HL; *Birch v Wade* (1814) 3 Ves & B 198; *Hopper v St John's College, Cambridge* (1914) 31 TLR 139. It seems that the 'fiduciary' power in question in *Bannerman's Trustees v Bannerman* 1915 SC 398 was not a power in the nature of a trust within the present meaning of that term: see at 408-409 per Lord Skerrington. As to the various kinds of trusts see TRUSTS vol 48 (2007 Reissue) PARAS 611, 624 et seq.

3 *Wheeler v Warner* (1823) 1 Sim & St 304; *Tweeddale v Tweeddale* (1878) 7 ChD 633.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/209. Implied trust for objects.

## 209. Implied trust for objects.

If there is a power to appoint among certain objects<sup>1</sup> but no gift to those objects and no gift over in default of appointment<sup>2</sup>, or a gift to a class<sup>3</sup> and a power to appoint in what shares and what manner the members shall take<sup>4</sup>, the court may imply a trust for, or gift to, those objects equally if the power is not exercised<sup>5</sup>. The rule is the same whether or not there is a gift over in default of objects of the power<sup>6</sup>, or a gift over on an event which does not happen<sup>7</sup>, and it applies even if the donee has power to exclude one class entirely, provided there is an intention to give the property to the objects<sup>8</sup>. For the rule to apply there must be a clear indication that the donor intended the power to be in the nature of a trust<sup>9</sup>; any contrary intention defeats an implied trust<sup>10</sup>. Further, where in default of appointment there is a gift over to the objects of the power or to other persons, the words of the power cannot operate to vest any estate in the objects of it by implication if there is no appointment<sup>11</sup>, even if the gift over is void for remoteness<sup>12</sup>.

1 The word 'object' is used to denote a person who is one of the specified persons or class of persons in whose favour the power may be exercised.

2 A residuary gift is not equivalent to a gift in default: *Re Hall, Sheil v Clark* [1899] 1 IR 308. See also *Re Brierley, Brierley v Brierley* (1894) 43 WR 36, CA.

3 'A gift is said to be to a 'class' of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula and who, if they take at all, are to take one divisible subject in certain proportionate shares': *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 723, HL, per Lord Selborne LC. See also *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449, [1988] 1 WLR 234, CA.

4 *Re Hughes, Hughes v Footner* [1921] 2 Ch 208; *Re Clarke, Bracey v Royal National Lifeboat Institution* [1923] 2 Ch 407.

5 *Brown v Higgs* (1799) 4 Ves 708 (reheard (1800) 5 Ves 495; affd (1803) 8 Ves 561, HL); *Cruwys v Colman* (1804) 9 Ves 319; *Parsons v Baker* (1812) 18 Ves 476; *Birch v Wade* (1814) 3 Ves & B 198; *Forbes v Ball* (1817) 3 Mer 437; *Grant v Lynam* (1828) 4 Russ 292; *Walsh v Wallinger* (1830) 2 Russ & M 78; *Burrough v Philcox, Lacey v Philcox* (1840) 5 My & Cr 72; *Salisbury v Denton* (1857) 3 K & J 529 at 535; *Re White's Trusts* (1860)

John 656; *Re Caplin's Will* (1865) 2 Drew & Sm 527; *Butler v Gray* (1869) 5 Ch App 26; *Carthew v Euraght* (1872) 20 WR 743. See also *Re Phene's Trusts* (1868) LR 5 Eq 346; *Re Hargrove's Trusts* (1873) IR 8 Eq 256; *Ahearne v Ahearne* (1881) 9 LR Ir 144; *Moore v Ffolliot* (1887) 19 LR Ir 499; *Re Brierley, Brierley v Brierley* (1894) 43 WR 36, CA; *Re Patterson, Dunlop v Greer* [1899] 1 IR 324; *Re Llewellyn's Settlement, Official Solicitor v Evans* [1921] 2 Ch 281 (trust to convey and transfer to such child or children in such shares etc as donee should appoint). A gift over in tail has been implied from a gift to A, B and C and their lawful issue, in such proportions as X should appoint: *Martin v Swannell* (1840) 2 Beav 249.

6 *Witts v Boddington* (1790) 3 Bro CC 95; *Crozier v Crozier* (1843) 3 Dr & War 353; *Acheson v Fair* (1843) 3 Dr & War 512; *Fenwick v Greenwell* (1847) 10 Beav 412; *Roddy v Fitzgerald* (1857) 6 HL Cas 823 at 856; *Stolworthy v Sancroft* (1864) 33 LJ Ch 708; *Butler v. Gray* (1869) 5 Ch App 26; *Wilson v Duguid* (1883) 24 ChD 244. The same rule applies to charities: *Moggridge v Thackwell* (1803) 7 Ves 36 (affd (1807) 13 Ves 416, HL); *Paice v Archbishop of Canterbury* (1807) 14 Ves 364; *Mills v Farmer* (1815) 1 Mer 55; *Salisbury v Denton* (1857) 3 K & J 529; *Re Pyne, Lilley v A-G* [1903] 1 Ch 83. See also *Re White, White v White* [1893] 2 Ch 41, CA; and see generally CHARITIES.

7 *Kennedy v Kingston* (1821) 2 Jac & W 431.

8 *Longmore v Broom* (1802) 7 Ves 124; *Jones v Torin* (1833) 6 Sim 255; *Penny v Turner* (1848) 2 Ph 493; *Re White's Trusts* (1860) John 656; *Carthew v Euraght* (1872) 20 WR 743. See also *Down v Worrall* (1833) 1 My & K 561; *Little v Neil* (1862) 31 LJ Ch 627; *Re Kieran, Matthews v Kieran* [1916] 1 IR 289 at 296, where the class was expressed to be 'such other son as the donee should appoint'. In default of the exercise of the power, members of the class took in equal shares.

9 See *Re Combe, Combe v Combe* [1925] Ch 210 at 217-218 per Tomlin J, where the decision of Sargant J in *Re Hughes, Hughes v Footner* [1921] 2 Ch 208 is explained and the rule stated in Farwell on Powers (3rd Edn) 528 disapproved.

10 *Crossling v Crossling* (1794) 2 Cox Eq Cas 396; *Healy v Donnery* (1853) 3 ICLR 213; *Brook v Brook* (1856) 3 Sm & G 280; *Re Eddowes* (1861) 1 Drew & Sm 395; *Carberry v McCarthy* (1881) 7 LR Ir 328; *Re Weekes' Settlement* [1897] 1 Ch 289, explained in *Re Llewellyn's Settlement, Official Solicitor v Evans* [1921] 2 Ch 281; *Clibborn v Horan* [1921] 1 IR 93 (no trust); *Re Combe, Combe v Combe* [1925] Ch 210, where there was a trust for such persons as the donee should appoint within a class of persons related to the donor by blood, and it was held that there was no intention to create a trust in favour of objects and no gift could be implied in default of appointment; *Re Perowne, Perowne v Moss* [1951] Ch 785, [1951] 2 All ER 201. See also *Bull v Vardy* (1791) 1 Ves 270; *Wheeler v Warner* (1823) 1 Sim & St 304.

11 *Jenkins v Quinchant* (circa 1745) 5 Ves 596 n; *Pattison v Pattison* (1855) 19 Beav 638; *Richardson v Harrison* (1885) 16 QBD 85, CA; *Re Mills, Mills v Lawrence* [1930] 1 Ch 654, CA (power not coupled with a trust).

12 *Re Sprague, Miley v Cape* (1880) 43 LT 236.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/210. Implied trust in favour of class.

## 210. Implied trust in favour of class.

If the instrument itself gives the property to a class, but gives to a named person a power to appoint in what shares and in what manner the members of the class are to take, the property vests in all the members of the class until the power is validly<sup>1</sup> exercised, and they all take in default of appointment<sup>2</sup>. The fact that the power is exercisable only by will does not postpone the period of vesting<sup>3</sup>; nor does the fact that the testator has given a prior life interest<sup>4</sup>. However, the gift of a prior life interest may serve to keep the class open<sup>5</sup>, although the mere continued existence of the power will not<sup>6</sup>.

1 *Vanderzee v Aclom* (1799) 4 Ves 771 at 787. See also *Penny v Turner* (1848) 2 Ph 493 (failure of power); *Re Clarke, Bracey v Royal National Lifeboat Institution* [1923] 2 Ch 407 (invalid power).

2 *Doe d Willis v Martin* (1790) 4 Term Rep 39; *Coleman v Seymour* (1749) 1 Ves Sen 209; *Casterton v Sutherland* (1804) 9 Ves 445; *Lambert v Thwaites* (1866) LR 2 Eq 151; *Bradley v Cartwright* (1867) LR 2 CP 511;



*Wilson v Duguid* (1883) 24 ChD 244; *Re Gun, Sheehy v Nugent* [1915] 1 IR 42; *Re Hughes, Hughes v Footner* [1921] 2 Ch 208; *Re Clarke, Bracey v Royal National Lifeboat Institution* [1923] 2 Ch 407. See also *Re Master's Settlement, Master v Master* [1911] 1 Ch 321; *Haswell v Haswell* (1860) 2 De GF & J 456 at 460, 462; *Re Aylwin's Trusts* (1873) LR 16 Eq 585. Contrast *Re Cooper, Townend v Townend* (1917) 86 LJ Ch 507, where the income remained undisposed of, after the determination of a prior interest, until the persons who could take under and in default of appointment could be ascertained.

3 *Heron v Stokes* (1842) 2 Dr & War 89; *Brown v Pocock* (1833) 6 Sim 257. If the power is contingent on the donee leaving children and there is a gift over in default of children, no one can take by implication if no child survives: *Winn v Fenwick* (1849) 11 Beav 438; *Stolworthy v Sancroft* (1864) 33 LJ Ch 708. See also *Faulkner v Lord Wynford* (1845) 9 Jur 1006.

4 See the cases cited in note 2 supra.

5 See the rules stated in *Re Chartres, Farman v Barrett* [1927] 1 Ch 466 at 471-472 per Astbury J.

6 *Re Hughes, Hughes v Footner* [1921] 2 Ch 208. See, however, the suggestion of Astbury J in *Re Chartres, Farman v Barrett* [1927] 1 Ch 466 at 475, 477-478, although this may be doubted.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/211. Absence of gift to a class.

## 211. Absence of gift to a class.

If the instrument contains no gift to any class but only a power to a donee to appoint as he chooses among a class, and the court implies a trust for, or gift to, those objects<sup>1</sup>, in default of appointment the gift goes to those to whom the donee might have appointed, and those alone<sup>2</sup>. Thus, if the power is only testamentary, those alone who survive the donee can take by implication, because they alone could have taken under an exercise of the power<sup>3</sup>. Within these limits (that is, where no gift is expressly given to the class, and excluding those to whom the donee was debarred from appointing) the authorities appear to establish the following propositions as to the time at which to ascertain the class to take by implication in default of appointment.

- 1 (1) Where there is no prior life interest, those persons take who formed members of the class and answered the description at the time when the instrument creating the power came into effect<sup>4</sup>. The whole interest that might have been appointed will pass by implication<sup>5</sup>.
- 2 (2) Where a prior life interest is given, the class is kept open; but if enjoyment in person is intended, only those members who survive the tenant for life can take<sup>6</sup>.
- 3 (3) Where enjoyment in person is not essential, the rule in head (2) above does not apply<sup>7</sup>. If the tenant for life and the donee of the power are the same person, the class is kept open until his death<sup>8</sup>; but if they are different persons, the position is not clear. It seems that, if the tenant for life dies first, the class remains open until the donee dies<sup>9</sup>, and, if the donee dies first, until the tenant for life dies<sup>10</sup>.

1 See PARA 209 ante.

2 *Kennedy v Kingston* (1821) 2 Jac & W 431; *Lambert v Thwaites* (1866) LR 2 Eq 151; and see *Walsh v Wallinger* (1830) 2 Russ & M 78; *Winn v Fenwick* (1849) 11 Beav 438; *Sinnott v Walsh* (1880) 5 LR Ir 27, Ir CA; *Re Susanni's Trusts* (1877) 47 LJ Ch 65; *Re Llewellyn's Settlement, Official Solicitor v Evans* [1921] 2 Ch 281, where appointed shares were to be payable to children at 21; children who died under 21 were excluded from taking by implication in default of appointment. See also *Re Arnold, Wainwright v Howlett* [1947] Ch 131, [1946] 2 All ER 579.

3 Contrast *Re Arnold, Wainwright v Howlett* [1947] Ch 131, [1946] 2 All ER 579, where the power was exercisable by deed or will.

4 *Longmore v Broom* (1802) 7 Ves 124; *Cole v Wade* (1807) 16 Ves 27; varied on appeal sub nom *Walter v Maunde* (1815) 19 Ves 424 at 426.

5 *Re Stinson's Estate* [1910] 1 IR 47; *Crozier v Crozier* (1843) 3 Dr & War 353. But for the position where there is an express gift in default see PARA 223 text and note 5 post. *Re Gillies' Settlement, Archer v Penney* [1917] 2 Ch 205 cannot now be relied upon. See *Re Bostock's Settlement, Norrish v Bostock* [1921] 1 Ch 432 at 438; on appeal [1921] 2 Ch 469, CA. For a case of direct gift see *Re Hughes, Hughes v Footner* [1921] 2 Ch 208, cited in PARA 210 note 6 ante.

6 *Re White's Trusts* (1860) John 656; *Carthew v Euraght* (1872) 20 WR 743; *Re Phene's Trusts* (1868) LR 5 Eq 346.

7 *Wilson v Duguid* (1883) 24 ChD 244; *Re Llewellyn's Settlement, Official Solicitor v Evans* [1921] 2 Ch 281 at 291; *Grieveson v Kirsopp* (1837) 2 Keen 653; *Lambert v Thwaites* (1866) LR 2 Eq 151 at 157 per Kindersley V-C; *Re Arnold, Wainwright v Howlett* [1947] Ch 131, [1946] 2 All ER 579.

8 *Re Llewellyn's Settlement, Official Solicitor v Evans* [1921] 2 Ch 281.

9 See *Re White's Trusts* (1860) John 656 at 659 per Page Wood V-C; compare the cases of direct gift cited in PARA 210 note 6 ante; and *Carthew v Euraght* (1872) 20 WR 743.

10 *Re White's Trusts* (1860) John 656, particularly at 659. Compare to the contrary *Re Swan, Reid v Swan* [1911] 1 IR 405, where the donee was a tenant for life but was survived by other tenants for life; *Birch v Wade* (1814) 3 Ves & B 198. Cases concerning 'relations' (see also PARA 212 text and note 4 post) are peculiar: *Wilson v Duguid* (1883) 24 ChD 244 at 251 per Chitty J; *Re Gun, Sheehy v Nugent* [1915] 1 IR 42 (next of kin at testator's death); *Pope v Whitcombe* (1810) 3 Mer 689, where the power does not appear to have been testamentary only, as corrected in *Finch v Hollingsworth* (1855) 21 Beav 112 (death of tenant for life and donee of the power).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/212. Mode of distribution of implied gifts.

## 212. Mode of distribution of implied gifts.

The court adopts any rule laid down by the donor of the power as to the mode of distribution<sup>1</sup>. Subject to this, where an implied gift to members of a class in default of appointment takes effect, all members of the class take as tenants in common<sup>2</sup> in equal shares<sup>3</sup>, on the principle that 'equality is equity'. Although under a power to appoint among 'relations', which is a power of selection and not merely of distribution, the power may be exercised in favour of any relations, the class which takes in default is confined to next of kin according to statute<sup>4</sup>. A power of distribution amongst relations, which is not certain, may also be exercised in favour of any relations and is not restricted to next of kin<sup>5</sup>.

1 *Gower v Mainwaring* (1750) 2 Ves Sen 87; *A-G v Price* (1810) 17 Ves 371; *Mahon v Savage* (1803) 1 Sch & Lef 111; *Hewett v Hewett* (1765) 2 Eden 332.

2 *Re Arnold, Wainwright v Howlett* [1947] Ch 131, [1946] 2 All ER 579.

3 *Doyley v A-G* (1735) 4 Vin Abr 485 pl 16; *Salisbury v Denton* (1857) 3 K & J 529; *Re Gavacan, O'Meara v A-G* [1913] 1 IR 276; *Re Clarke, Bracey v Royal National Lifeboat Institution* [1923] 2 Ch 407 (direct gift). See also *Jones v Jones* (1846) 5 Hare 440.

4 *Re Gun, Sheehy v Nugent* [1915] 1 IR 42; *Wilson v Duguid* (1883) 24 ChD 244 at 251; *Re Swan, Reid v Swan* [1911] 1 IR 405. For the persons entitled by statute to succeed on intestacy see EXECUTORS AND ADMINISTRATORS. As to the words necessary to create a precatory trust see TRUSTS vol 48 (2007 Reissue) PARAS 627, 651; and see further CHARITIES vol 8 (2010) PARA 74; DEEDS AND OTHER INSTRUMENTS.

5 *Re Poulton's Will Trusts, Smail v Litchfield* [1987] 1 All ER 1068, [1987] 1 WLR 795.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/213.  
Discretionary trusts.

### 213. Discretionary trusts.

What appears to be a mere power may be a trust to distribute among the class defined by the donor with merely a power of selection within that class. The trustees must exercise the power, and if they fail to do so, the court will exercise it<sup>1</sup>. It is a difficult matter of construction to decide whether the instrument gives the trustees a mere power or creates a discretionary trust<sup>2</sup>, and the use of inappropriate language is not decisive<sup>3</sup>. The trustees have a duty to exercise the power of selection and to distribute reasonably promptly after the income arises<sup>4</sup>, but a failure to do so leaves the unfulfilled duty still in existence for the benefit of those who would have been proper objects<sup>5</sup> if the discretion had been exercised within a reasonable time<sup>6</sup>. The rights of the objects in respect of undistributed income depend on the terms of the discretionary trust, but it seems that even a sole object cannot claim to have an interest in possession<sup>7</sup>; and, if there is a group of beneficiaries, no individual beneficiary has any relevant right whatsoever to the property<sup>8</sup>. The objects of a discretionary trust have been stated to have a collective right which, if they are all sui juris, they can exercise collectively<sup>9</sup>.

1 *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens* [1970] AC 508 at 525, [1968] 3 All ER 785 at 793, HL, per Lord Upjohn; *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; and see TRUSTS vol 48 (2007 Reissue) PARA 611. See also the Trustee Act 1925 s 33 (as amended); and SETTLEMENTS vol 42 para 917; TRUSTS vol 48 (2007 Reissue) PARA 1063.

2 *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens* [1970] AC 508, [1968] 3 All ER 785, HL. See also *Re Leek, Darwen v Leek* [1967] Ch 1061 at 1073, [1967] 2 All ER 1160 at 1164 per Buckley J (affd [1969] 1 Ch 563, [1968] 1 All ER 793, CA); *Re Baden's Deed Trusts, Baden v Smith* [1969] 2 Ch 388, [1969] 1 All ER 1016, CA.

3 *Wilson v Turner* (1883) 22 ChD 521 at 525, CA.

4 *Re Peel, Tattersall v Peel* [1936] Ch 161; *Re Gourju's Will Trusts, Starling v Custodian of Enemy Property* [1943] Ch 24, [1942] 2 All ER 605; *Re Gulbenkian's Settlement Trusts (No 2), Stephens v Maun* [1970] Ch 408, [1969] 2 All ER 1173; *Re Locker's Settlement Trusts, Meachem v Sachs* [1978] 1 All ER 216, [1977] 1 WLR 1323.

5 The objects of the trusts, as to the meaning of which see PARA 209 note 1 ante.

6 *Re Locker's Settlement Trusts, Meachem v Sachs* [1978] 1 All ER 216, [1977] 1 WLR 1323. The trustees would seem to have a limited right to retain income with a view to applying it to likely additions to the class: *Re Weir's Settlement Trusts, MacPherson and Viscount Weir v IRC* [1971] Ch 145, [1970] 1 All ER 297, CA. See also *Re Trafford's Settlement, Moore v IRC* [1985] Ch 32, [1984] 1 All ER 1108 (only one member of class, but class not closed).

7 *Re Weir's Settlement Trusts, MacPherson and Viscount Weir v IRC* [1971] Ch 145, [1970] 1 All ER 297, CA.

8 *Vestey v IRC (No 2)* [1979] Ch 198, [1979] 2 All ER 225, DC; affd [1980] AC 1148, [1979] 3 All ER 976, HL.

9 *Vestey v IRC (No 2)* [1979] Ch 198 at 206, [1979] 2 All ER 225 at 235, DC, per Walton J; affd [1980] AC 1148, [1979] 3 All ER 976, HL. See also *Re Nelson, Norris v Nelson* [1928] Ch 920n, CA; *Re Smith, Public Trustee v Aspinall* [1928] Ch 915; *Re Beckett's Settlement, Eden v Von Stutterheim* [1940] Ch 279 at 285; *Re Munro's Settlement Trusts* [1963] 1 All ER 209 at 211, [1963] 1 WLR 145 at 148; *Gartside v IRC* [1968] AC 553 at 606, [1968] 1 All ER 121 at 127, HL, per Lord Reid.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/214. Mode of distribution of discretionary trusts.

## **214. Mode of distribution of discretionary trusts.**

The court will execute a discretionary trust, following the trustees' failure to do so, in the manner best calculated to give effect to the intentions of the settlor or testator<sup>1</sup>. The court may appoint new trustees to execute the trust<sup>2</sup>, direct representatives of the beneficiaries to prepare a scheme<sup>3</sup> or direct the trustees to appoint on what appears to be the proper basis for distribution<sup>4</sup>.

1 *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce; and see PARA 286 post.

2 *Re Gestetner Settlement, Barnett v Blumka* [1953] Ch 672 at 688, [1953] 1 All ER 1150 at 1155 per Harman J; *IRC v Broadway Cottages Trust* [1955] Ch 20, [1954] 3 All ER 120, CA; *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce; *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17 at 25, [1973] 2 All ER 1203 at 1210 per Templeman J.

3 *Brunsdon v Woolredge* (1765) Amb 507; *Bennett v Honywood* (1772) Amb 708; *Supple v Lowson* (1773) Amb 729; *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce.

4 *Re J Bibby & Sons Ltd Pensions Trust Deed, Davies v IRC* [1952] 2 All ER 483 at 486 per Harman J; *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce. See also *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 at 28, [1972] 2 All ER 1304 at 1317, CA, per Stamp LJ.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/215. Uncertainty.

## **215. Uncertainty.**

Where there is a mere or bare power of appointment among a class and a valid gift over in default of appointment<sup>1</sup>, the power will be valid if one can say with certainty whether any individual is or is not a member of the class. One does not have to be able to ascertain every member of the class<sup>2</sup>. The test for the validity of discretionary trusts where the trustees must select from the class is the same<sup>3</sup>. The question of certainty must be determined as of the date of the document declaring the donor's intention or, in the case of a will, as of the date of his death<sup>4</sup>. In both cases the trustees have a duty to survey the range of possible objects, and a wider and more comprehensive range of inquiry is needed for discretionary trusts<sup>5</sup>. A special power might fail if it is so capricious as to negative a sensible intention on the part of the settlor<sup>6</sup>, or if the class is so wide that it does not amount to a class in any true sense at all<sup>7</sup>.

1 *Re Park, Public Trustee v Armstrong* [1932] 1 Ch 580.

2 *Re Gestetner Settlement, Barnett v Blumka* [1953] Ch 672, [1953] 1 All ER 1150; *Re Coates, Ramsden v Coates* [1955] Ch 495, [1955] 1 All ER 26; *Re Sayer Trust, MacGregor v Sayer* [1957] Ch 423, [1956] 3 All ER 600; *Re Hain's Settlement, Tooth v Hain* [1961] 1 All ER 848 at 851, [1961] 1 WLR 440 at 445, CA, per Lord Evershed MR; *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens* [1970] AC 508, [1968] 3 All ER 785, HL. See also *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202 (intermediate power of appointment not necessarily invalid because of width of power and number of potential objects of appointment); *Re Beatty's Will Trusts, Hinvies v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503.

3 *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; *Re Baden's Deed Trusts (No 2)* [1973] Ch 9, [1972] 2 All ER 1304, CA; *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203.

4 *Re Hain's Settlement, Tooth v Hain* [1961] 1 All ER 848 at 850, [1961] 1 WLR 440 at 444, CA, per Lord Evershed MR; *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens* [1970] AC 508 at 524, [1968] 3 All ER 785 at 793, HL, per Lord Upjohn.

5 *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247 per Lord Wilberforce.

6 *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17 at 27, [1973] 2 All ER 1203 at 1211 per Templeman J (power to benefit the residents of Greater London).

7 *Blausten v IRC* [1972] Ch 256 at 273, [1972] 1 All ER 41 at 51, CA, per Buckley LJ. See also *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce; and TRUSTS vol 48 (2007 Reissue) PARA 656.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/1. GENERAL NATURE OF POWERS/(2) POWERS IN THE NATURE OF TRUSTS AND DISCRETIONARY TRUSTS/216. Fiduciary powers.

## 216. Fiduciary powers.

A fiduciary power can arise when a mere power is conferred on trustees of property or on any other person as a trustee of the power itself<sup>1</sup>. Such a fiduciary power is not rendered invalid merely because of the width of potential objects<sup>2</sup>. Where such a fiduciary power exists, the trustees must consider: (1) periodically whether or not to exercise the power; (2) the range of objects of the power; and (3) the appropriateness of individual appointments<sup>3</sup>. A fiduciary power of this nature cannot be released<sup>4</sup>. If the power is exercised, then under the rule in *Hastings-Bass*<sup>5</sup>, the court will interfere if it is clear that the donee of the power would not have acted as he did, had he not failed to take into account considerations which he ought to have taken into account<sup>6</sup>. If such a power cannot be exercised, for example it is a power in respect of a pension scheme to directors of a company in liquidation, then the court can adopt the same methods of execution as it would in the case of a discretionary trust<sup>7</sup>, and which appear most appropriate in the circumstances<sup>8</sup>.

1 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587; and see *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202; *Re Beatty's Will Trusts, Hives v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503.

2 See PARA 215 ante; and *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

3 *Re Hay's Settlement Trusts* [1981] 3 All ER 786 at 793, [1982] 1 WLR 202 at 210 per Megarry V-C.

4 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 545, [1990] 1 WLR 1587 at 1614 per Warner J; and see PARA 375 post

5 *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA; and see PARA 286 post.

6 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 555, [1990] 1 WLR 1587 at 1624 per Warner J; and see *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718 per Robert Walker J.

7 See PARA 214 ante.

8 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 549, [1990] 1 WLR 1587 at 1618 per Warner J.

## UPDATE

### 216 Fiduciary powers

NOTE 5--*Hastings-Bass*, cited, applied: *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), (2006) 8 ITELR 917.

NOTE 6--See *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693 (appointment set aside where trustees failed to understand tax implications because they had received inaccurate legal advice); and *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] STC 901 (settlement avoided as inheritance tax position not taken into account by trustee or her advisers).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(i) Instruments creating Powers/217. Instruments inter vivos.

## **2. CREATION OF POWERS**

### **(1) CREATION OF POWERS IN GENERAL**

#### **(i) Instruments creating Powers**

##### **217. Instruments inter vivos.**

Powers to execute a deed must be created by deed<sup>1</sup>, but other powers may be created in any way by which the donor could himself make the disposition authorised by the power<sup>2</sup>. Powers of appointment or revocation may be reserved either in the body of a deed, or by indorsement before the execution of the deed, or by deed of even date<sup>3</sup>.

1 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 563, CA; and see AGENCY vol 1 (2008) PARA 15; DEEDS AND OTHER INSTRUMENTS.

2 See Farwell on Powers (3rd Edn) 56. Powers formerly operating under the Statute of Uses (1535) (repealed: see PARA 204 note 1 ante) could only take effect on the legal estate when inserted in deeds operating by transmutation of possession: Sugden on Powers (8th Edn) 140. As to devises to uses see Sugden on Powers (8th Edn) 146-148, 197, 198; *Baker v White* (1875) LR 20 Eq 166 at 171; *Cunliffe v Brancker* (1876) 3 ChD 393, CA; *Berry v Berry* (1878) 7 ChD 657; *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465 at 478, CA; *Re Brooke, Brooke v Brooke* [1894] 1 Ch 43; *Re Brooke, Brooke v Dickson* [1923] 2 Ch 265, CA.

3 Sugden on Powers (8th Edn) 137.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(i) Instruments creating Powers/218. Wills.

##### **218. Wills.**

A testamentary power of appointment does not infringe the rule<sup>1</sup> that in general a testator cannot delegate his testamentary power<sup>2</sup>, for special powers and hybrid powers are recognised exceptions to the rule<sup>3</sup>, and a general power is virtually equivalent to ownership<sup>4</sup>.

Like any other will, a will containing a power may be revoked by the testator at any time before death<sup>5</sup>. Where a will gives a life interest and a special power of appointment, a codicil revoking all benefits in favour of the life tenant revokes the power of appointment<sup>6</sup>.

1 *Houston v Burns* [1918] AC 337 at 342, HL; *A-G v National Provincial and Union Bank of England* [1924] AC 262 at 268, HL; *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341 at 371, [1944] 2 All ER 60 at 74, HL. See also WILLS vol 50 (2005 Reissue) PARA 309.

2 See *Re Park, Public Trustee v Armstrong* [1932] 1 Ch 580 at 583; *Re Jones, Public Trustee v Jones* [1945] Ch 105; *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463 at 474-476, [1967] 2 All ER 1175 at 1183-1184 per Cross J; *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203; *Re Beatty's Will Trusts, Hives v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503.

3 *A-G of New Zealand v New Zealand Insurance Co Ltd* [1936] 3 All ER 888 at 890, PC; *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL; *Re Neave, Neave v Neave* [1938] Ch 793 at 798, [1938] 3 All ER 220 at 225; *Re Jones, Public Trustee v Jones* [1945] Ch 105.

4 *Re Hughes, Hughes v Footner* [1921] 2 Ch 208 at 212.

5 As to revocation of a will see WILLS vol 50 (2005 Reissue) PARA 379 et seq.

6 *Re Brough, Currey v Brough* (1888) 38 ChD 456; followed in *Re Spensley's Will Trusts, Barclays Bank Ltd v Staughton* [1952] Ch 886, [1952] 2 All ER 49; revsd on another point [1954] Ch 233, [1954] 1 All ER 178, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/219. In general.

## (ii) Construction of Powers

### 219. In general.

No technical or express words are necessary either in a deed or in a will to create a power, so long as the intention is sufficiently clear<sup>1</sup>. The intention may be found in a recital or in an exception from a prohibition<sup>2</sup>; or it may be implied, as where the existence of a power is necessary for carrying out some express provision<sup>3</sup>, or if the person who could have created a power clearly makes his dispositions on the hypothesis that such a power exists<sup>4</sup>. Although the mere use of the word 'assigns' in a gift to the heirs and assigns of A was formerly held to imply that A had a power of appointment<sup>5</sup>, this is now not enough<sup>6</sup>.

1 Sugden on Powers (8th Edn) 102; *Bishop of Oxford v Leighton* (1700) 2 Vern 376.

2 *Read and Nashe's Case* (1589) 1 Leon 147, where the court implied powers of jointuring and leasing from a proviso for forfeiture, in a case of alienation other than for jointures or leases; *Re Bolton Estates, Russell v Meyrick* [1903] 2 Ch 461, CA.

3 *Bateman v Bateman* (1739) 1 Atk 421, where a power of sale over land was implied out of a devise of land with a proviso for the payment of debts out of the devised estate; *Curling v Austin* (1862) 2 Drew & Sm 129 at 136; *Tait v Lathbury* (1865) LR 1 Eq 174; *Master v De Croismar* (1848) 11 Beav 184; *Sheffield v Earl of Coventry* (1852) 2 De GM & G 551; *Re Garnett Orme and Hargreaves Contract* (1883) 25 ChD 595; *Re Gent and Eason's Contract* [1905] 1 Ch 386; *Re Pope's Contract* [1911] 2 Ch 442 (implied power to vary investments); *Re Wragg, Wragg v Palmer* [1919] 2 Ch 58 (power, on construction, to purchase real estate; power to appropriate unsold real estate); *Dean v Dean* [1891] 3 Ch 150 at 157, where a power to enter and take profits and a power to convey by revocation of uses was implied out of express powers of maintenance and advancement. See also *Re Stamford and Earl of Warrington, Payne v Grey* [1911] 1 Ch 255 (on appeal [1912] 1 Ch 343, CA); *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd (Bates & Partners (a firm) (third party))* [1987] 1 All ER 281, [1986] 1 WLR 1440 (power to sell, lease, buy and contract implied from charitable housing association's rule 'to do all things necessary ... for fulfilment of its objects').

4 *Downes v Timperon* (1828) 4 Russ 334, where a gift over in the event that a married woman should die without disposing of her interest by will was taken to imply a power of appointment, since she could not at that time otherwise have made a will during coverture; *Wood v White* (1839) 4 My & Cr 460; *Affleck v James* (1849) 17 Sim 121; *Wheeler v Howell* (1857) 3 K & J 198; *Knocker v Bunbury* (1840) 6 Bing NC 306.

<sup>5</sup> le where otherwise no effect would be given to the word 'assigns': see *Quested v Michell* (1855) 24 LJ Ch 722 at 724; *Tapner d Peckham v Merlott* (1739) Willes 177; *A-G v Vigor* (1803) 8 Ves 256 at 291.

<sup>6</sup> *Brookman v Smith* (1871) LR 6 Exch 291 (affd (1872) LR 7 Exch 271, Ex Ch); *Milman v Lane* [1901] 2 KB 745, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/220. Distinction between property and power.

## 220. Distinction between property and power.

The creation of a power over property does not in any way vest the property in the donee<sup>1</sup>, although the exercise of the power may do so<sup>2</sup>, and it is often difficult to say whether the intention was to give property or only a power over property. If a life interest is first given and a power of disposition by deed or will added, this is not an absolute gift vesting the property in the donee<sup>3</sup>. This rule applies even if the first gift is on the face of it absolute and is only cut down by subsequent words<sup>4</sup>, but it is a question of intention, and possibly the express mention of the life interest may be taken to be merely a reference to one of the advantages attached to the absolute interest passing under the gift<sup>5</sup>. However, if there is a gift by will to a person indefinitely, with a superadded power of disposition by deed or will, the property vests in him absolutely at once<sup>6</sup>. This is so even if the first gift is a gift of income only, provided it is unlimited in point of time<sup>7</sup>. Again, a gift over in default of the exercise of a power, not being a mere residuary gift, is evidence of an intention to create a power and not to give an absolute interest<sup>8</sup>, as is the fact that the donee is under some disability which the donor cannot remove<sup>9</sup>. Yet if an estate for life is severed from the power of appointment for the purpose of introducing other distinct and separate contingent estates which never, in fact, arise, the court may in a proper case infer that the donee takes not a mere life estate with a power of appointment, but absolutely<sup>10</sup>. Finally, if an absolute gift of realty or personalty (it seems whether by deed or will) is followed by words sounding like a power, whether general or limited, any gift over if the power is not exercised is repugnant and void<sup>11</sup>.

<sup>1</sup> See, however, the Insolvency Act 1986 s 283(4); and PARA 207 ante.

<sup>2</sup> *Re Armstrong, ex p Gilchrist* (1886) 17 QBD 521, CA; *Tremayne v Rashleigh* [1908] 1 Ch 681, where it was held that a covenant to settle after acquired property did not extend to property over which the covenantor acquired a general power of appointment; following *Townshend v Harrowby* (1858) 27 LJ Ch 553; and *Re Lord Gerard, Oliphant v Gerard* (1888) 58 LT 800; but not following *Steward v Poppleton* [1877] WN 29; and *Re O'Connell, Mawle v Jagoe* [1903] 2 Ch 574. See also *Bower v Smith* (1871) LR 11 Eq 279; *Murray's Trustees v MacGregor's Trustees* 1931 SC 516; *Re Mathieson* [1927] 1 Ch 283, CA, where it was held that a settlement made in exercise of a general power is not within the Bankruptcy Act 1914 s 42 (repealed) (see now the Insolvency Act 1986 ss 339, 423-425); and *Re Reeve, Reeve v Reeve* [1935] Ch 110, a decision under the Administration of Estates Act 1925 s 47(1)(iii) (repealed).

<sup>3</sup> *Bradly v Westcott* (1807) 13 Ves 445; *Reith v Seymour* (1828) 4 Russ 263 (personalty); *Nannock v Horton* (1802) 7 Ves 391; *Liefe v Saltingstone* (1674) 1 Mod Rep 189; *Archibald v Wright* (1838) 9 Sim 161; *Scott v Josselyn* (1859) 26 Beav 174; *Re Thomson's Estate, Herring v Barrow* (1880) 14 ChD 263, CA; *Pennock v Pennock* (1871) LR 13 Eq 144; *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939; *Re Burkitt, Handcock v Studdert* [1915] 1 IR 205; *Young v Young* (1918) 52 ILT 40; *Re Keighley, Keighley v Keighley* [1919] 2 Ch 388. See also *Espinasse v Luffingham* (1846) 3 Jo & Lat 186; *Re Pedrotti's Will* (1859) 27 Beav 583; *Re Richards, Uglow v Richards* [1902] 1 Ch 76; *Re Shuker's Estate, Bromley v Reed* [1937] 3 All ER 25.

<sup>4</sup> *Re Stringer's Estate, Shaw v Jones-Ford* (1877) 6 ChD 1, CA; *Re Pounder, Williams v Pounder* (1886) 56 LJ Ch 113. See also *Re Jones, Richards v Jones* [1898] 1 Ch 438; and *Re McCarten, McKenna v McCarten* [1915] 1 IR 282.

<sup>5</sup> *Reid v Atkinson* (1871) IR 5 Eq 373 at 382 per Christian LJ.



6 *Re Jones, Richards v Jones* [1898] 1 Ch 438; *Howorth v Dewell* (1860) 29 Beav 18; *Doe d Herbert v Thomas* (1835) 3 Ad & El 123; *Re McCarten, McKenna v McCarten* [1915] 1 IR 282; but compare *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939.

7 *Southouse v Bate* (1851) 16 Beav 132; *Weale v Ollive (No 2)* (1863) 32 Beav 421. See also *Re L'Herminier, Mounsey v Buston* [1894] 1 Ch 675, where it was held that a power to appoint income without limit was a power to appoint capital; *Townsend v Ascroft* [1917] 2 Ch 14, where it was held that a gift for life of £30 per annum charged on land with a power of 'leaving it' by will created a general power to appoint a perpetual rentcharge of that amount.

8 *Re Maxwell's Will* (1857) 24 Beav 246 at 250; *Healy v Donnery* (1853) 3 ICLR 213. See also *Re Brierley, Brierley v Brierley* (1894) 43 WR 36, CA; *Re Weekes' Settlement* [1897] 1 Ch 289; *Re Combe, Combe v Combe* [1925] Ch 210.

9 *Reid v Carleton* [1905] 1 IR 147.

10 *Re Maxwell's Will* (1857) 24 Beav 246; *Goodtitle d Pearson v Otway* (1753) 2 Wils 6; *Nowlan v Walsh, Nowlan v Wilde* (1851) 4 De G & Sm 584; Sugden on Powers (8th Edn) 108.

11 See GIFTS vol 52 (2009) PARA 264; WILLS vol 50 (2005 Reissue) PARA 419 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/221. Whether power testamentary or inter vivos.

## 221. Whether power testamentary or inter vivos.

A gift of income for life, with liberty to use the capital if the income is not sufficient, creates a general power to appoint the capital inter vivos, but probably not by will, provided the word 'sufficient' means sufficient for the desires of the beneficiary, as opposed to sufficient for his needs<sup>1</sup>. Yet a gift of residue to a person for life with full power to deal with it as if it were his own creates a power exercisable inter vivos or by will despite a gift over<sup>2</sup>. Moreover, a power to A to appoint real or personal estate after his own death is not rendered testamentary only by the mere reference to his death<sup>3</sup>. A power is, however, merely testamentary if any words are used which are inapplicable to an execution by writing inter vivos, or if an intention otherwise appears to confine the exercise of the power to an execution by will<sup>4</sup>.

1 *Re Richards, Uglov v Richards* [1902] 1 Ch 76; *Re Pedrotti's Will* (1859) 27 Beav 583; *Re Ryder, Burton v Kearsley* [1914] 1 Ch 865, CA (gift of income to A for life with authority so long as he shall be entitled to the income to apply such part of the capital as he shall think fit for his own use and benefit creates a general power of appointment inter vivos over the capital). See also *Re McIntosh* [1933] IR 69, where a gift of a limited interest in all the testator's property with power to utilise it for benefit of his daughters was held not to confer any power to apply the capital for their benefit.

2 *Re Lawry, Andrew v Coad* [1938] Ch 318, [1937] 4 All ER 1.

3 *Anon* (1578) 3 Leon 71; *Re David's Trusts* (1859) John 495; *Tomlinson v Dighton* (1711) 1 P Wms 149; *Ex p Williams* (1819) 1 Jac & W 89; *Humble v Bowman* (1877) 47 LJ Ch 62; *Re Jackson's Will* (1879) 13 ChD 189; but see to the contrary *Kennedy v Kingston* (1821) 2 Jac & W 431; *Reid v Reid* (1858) 25 Beav 469; *Freeland v Pearson* (1867) LR 3 Eq 658; *Archibald v Wright* (1838) 9 Sim 161.

4 *Doe d Thorley v Thorley* (1809) 10 East 438; *Walsh v Wallinger* (1830) 2 Russ & M 78; *Paul v Hewetson* (1833) 2 My & K 434.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/222. Gifts to executors and next of kin.

## 222. Gifts to executors and next of kin.

A limitation of personal estate to the executors and administrators of A has the same effect as a limitation of real estate to the right heirs of A<sup>1</sup>. Consequently a gift to A for life, with remainder as he shall appoint, with remainder to his executors and administrators, is an absolute gift to him if he does not exercise the power. If the ultimate limitation is to the personal representatives of the donee, this (whether in a will or in a deed) is prima facie a limitation to the executors and administrators in their representative capacity<sup>2</sup>. If the ultimate limitation is to the next of kin, or is to the personal representatives but these words are construed as equivalent to 'next of kin'<sup>3</sup>, the donee takes only an interest for life with a power of disposition.

1 *Anderson v Dawson* (1808) 15 Ves 532 at 536. As to gifts to heirs see the Law of Property Act 1925 s 132; and REAL PROPERTY vol 39(2) (Reissue) PARA 96.

2 *Saberton v Skeels* (1830) 1 Russ & M 587; *Re Crawford's Trusts* (1854) 2 Drew 230; *Re Wyndham's Trusts* (1865) LR 1 Eq 290; *Alger v Parrott* (1866) LR 3 Eq 328; *Re Best's Settlement Trusts* (1874) LR 18 Eq 686; *Re Brooks, Public Trustee v White* [1928] Ch 214, CA.

3 *Anderson v Dawson* (1808) 15 Ves 532; *Baines v Ottey* (1832) 1 My & K 465; *Daniel v Dudley* (1841) 1 Ph 1 at 6; *Briggs v Upton* (1872) 7 Ch App 376.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/223. Extent of interest to pass under power.

## 223. Extent of interest to pass under power.

In the absence of any expression of a contrary intention, a donor is taken to have created a power to pass the whole of his estate and interest<sup>1</sup>. Even before the Wills Act 1837<sup>2</sup>, a power to appoint to or among particular objects authorised an appointment of the fee, even if no words of inheritance were used; and the better opinion seems to be that a power to appoint to such persons as A should choose equally authorised a limitation of the fee<sup>3</sup>. Since that Act, unless a contrary intention appears in the will, a general devise without words of inheritance passes the fee simple or the whole estate or interest of which the testator had power to dispose by will<sup>4</sup>, and, it seems, gives the power over the fee to the person in whom a power of appointing the property is vested, even if the power itself does not contain words of inheritance or words equivalent to them<sup>5</sup>. A power to appoint income may authorise an appointment of capital<sup>6</sup>.

1 *Alloway v Alloway* (1843) 4 Dr & War 380; *Wykham v Wykham* (1811) 18 Ves 395 at 415; *Tomlinson v Dighton* (1711) 1 P Wms 149; *Bradley v Cartwright* (1867) LR 2 CP 511.

2 The Wills Act 1837 applies to wills made after 1837: see s 34; and WILLS vol 50 (2005 Reissue) PARA 740.

3 *Doe d Chadwick v Jackson* (1836) 1 Mood & R 553; *Saltonstall's Case* (1674) 2 Lev 104, sub nom *Liefe v Saltingstone* 1 Mod Rep 189; *R v Marquis of Stafford* (1806) 7 East 521; *Crozier v Crozier* (1843) 3 Dr & War 353 at 383.

4 See the Wills Act 1837 s 28; REAL PROPERTY vol 39(2) (Reissue) PARA 93; WILLS vol 50 (2005 Reissue) PARAS 659-660.

5 See *Kenworthy v Bate* (1802) 6 Ves 793, where the power was contained in a settlement; *Strutt v Braithwaite* (1852) 5 De G & Sm 369; *Re L'Herminier, Mounsey v Buston* [1894] 1 Ch 675. As to the use and construction of technical conveyancing language in equity see EQUITY vol 16(2) (Reissue) PARAS 554-555; TRUSTS vol 48 (2007 Reissue) PARA 734 et seq.

6 *Re L'Herminier, Mounsey v Buston* [1894] 1 Ch 675; *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223, [1964] 3 All ER 82.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/224. Referential powers.

## 224. Referential powers.

Referential powers are created by reference to primary powers, and are taken to be of the same nature and extent as the primary powers, having regard to any change of donee, object or circumstance. However, if there is any contingency or restriction personal to the donee of the primary power, the contingency or restriction is not attached to the referential power<sup>1</sup>. If the primary power is inconsistent with limitations and conditions to be attached to the referential power, the referential power will be made to conform to the intention displayed by the limitations<sup>2</sup>. If property is given to trustees subject to the power contained in another settlement, the persons to exercise the new powers are prima facie the trustees of the original settlement<sup>3</sup>. Further, if the words used are 'such or the like' trusts and powers, this means corresponding, and not necessarily identical, trusts and powers<sup>4</sup>. A reference to the 'trusts' of another settlement may be enough to incorporate the powers in that settlement, even though they are not expressly referred to<sup>5</sup>. Trusts declared by a document exercising a special power of appointment are to be read into the original settlement<sup>6</sup>. Exceptionally, the power creating a sub-settlement may be exercised in such a way as to create an entirely separate settlement<sup>7</sup>; but even an appointment to a sub-trust on exhaustive trusts, which utilises the administrative provisions of the original settlement will not be regarded as creating a separate settlement<sup>8</sup>. Furthermore, referential trusts and powers are not affected by subsequent variation by the court of the primary trusts and powers<sup>9</sup>, and a referential power may be exercised independently of the primary power<sup>10</sup>.

1 *Earl of Harrington v Countess Dowager of Harrington* (1868) LR 3 HL 295; *Morgan v Rutson* (1848) 16 Sim 234. See also PARA 260 post.

2 *Crossman v Bevan* (1859) 27 Beav 502; *Earle v Barker* (1865) 11 HL Cas 280; *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257 (express limitation on new power).

3 *Taylor v Miles* (1860) 28 Beav 411. See also *Earl of Shrewsbury v Keightley* (1866) LR 2 CP 130, Ex Ch.

4 *Re Smith, Bashford v Chaplin* (1881) 45 LT 246; *Garde v Garde* (1843) 3 Dr & War 435; *Marshall v Baker* (1862) 31 Beav 608.

5 *Re Arnell, Re Edwards, Prickett v Prickett* [1924] 1 Ch 473; *Re Penton's Settlement Trusts, Penton v Langley* [1924] 2 Ch 192 (power implied in settlement of chattels to devolve with land).

6 *Muir (or Williams) v Muir* [1943] AC 468, HL; *Roome v Edwards* [1982] AC 279 at 293, [1981] 1 All ER 736 at 740 per Lord Wilberforce, HL.

7 See *Roome v Edwards* [1982] AC 279 at 293, [1981] 1 All ER 736 at 740 per Lord Wilberforce, HL; and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 123.

8 See *Swires v Renton* [1991] STC 490; *Bond v Pickford* [1983] STC 517, CA.

9 *Re Gooch, Gooch v Gooch* [1929] 1 Ch 740.

10 *Re Penton's Settlement Trusts, Penton v Langely* [1924] 2 Ch 192.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/225. Extent of incorporation of powers.

## 225. Extent of incorporation of powers.

It is a question of intention whether the effect of a second gift is to make the property contained in that gift a fund to be added and treated for all purposes as an accretion to the funds originally settled, or to create another settlement with referential trusts<sup>1</sup>. A general reference to the trusts and powers of an existing will or settlement incorporates the trusts and powers referred to, but not the point of time when the benefits are to arise<sup>2</sup>.

1 *Eustace v Robinson* (1880) 7 LR Ir 83, Ir CA; *Re Fraser, Ind v Fraser* [1913] 2 Ch 224; *Re Carr, Heald v Smith* (1914) 137 LT Jo 564; *Re Paul's Settlement Trusts, Paul v Nelson* [1920] 1 Ch 99. See also *Re Bromhead's Trusts, Public Trustee v Bromhead* [1922] 1 IR 75. Contrast *Re North, Meates v Bishop* (1897) 76 LT 186; *Re Walpole's Marriage Settlement, Thomson v Walpole* [1903] 1 Ch 928; *Re Cavendish's Settlement, Grosvenor v Butler* [1912] 1 Ch 794; *Re Wood, Wodehouse v Wood* [1913] 1 Ch 303 (affd [1913] 2 Ch 574, CA); *Re Beaumont, Bradshaw v Packer* [1913] 1 Ch 325; *Re Campbell's Trusts, Public Trustee v Campbell* [1922] 1 Ch 551; *Re Rydon's Settlement, Barclays Bank Ltd v Everitt* [1955] Ch 1, [1954] 3 All ER 1, CA (criticising *Re Cavendish's Settlement, Grosvenor v Butler* supra). See further the Inheritance Tax Act 1984 s 67(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 498.

2 *Minton v Kirwood* (1868) 3 Ch App 614; *Peover v Hassel* (1861) 1 John & H 341; *Wood v Wood* (1870) LR 10 Eq 220; *Meade King v Warren* (1863) 32 Beav 111 (but see, to the contrary, *Gould v Gould* (1856) 2 Jur NS 484). Contrast *Earl of Cardigan v Armitage* (1823) 2 B & C 197; *Harrison v Symons* (1866) 14 WR 959; *Jones v Davies* (1878) 8 ChD 205.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/226. Restriction of powers.

## 226. Restriction of powers.

A power expressly created in general terms by an executed instrument is not to be cut down except by express words<sup>1</sup>. Once it has become effective, it will not be restricted by subsequent actual or possible events<sup>2</sup>. If, however, the instrument is executory the court may give effect to the intention of the instrument, even if it is not stated in express terms. In the case of marriage articles this might more easily be done so as to give effect to the presumed intention in favour of issue<sup>3</sup>, but in the case of wills the intention must be very clear to enable a general power to be cut down if expressly given<sup>4</sup>. The generality of words of limitation under which a person takes an absolute estate in default of appointment is not controlled by the fact that he has only a limited power of appointment; the expressed intention must in every case prevail<sup>5</sup>.

1 *Hare v Hare* (1876) 24 WR 575; *Countess of Berchtoldt v Marquis of Hertford* (1844) 7 Beav 172; *Minton v Kirwood* (1868) 3 Ch App 614.

2 *Knapp v Knapp* (1871) LR 12 Eq 238; but see *Re Johnston's Estate* (1922) 56 ILT 153, Ir CA cited in PARA 206 note 7 ante.

3 *Bristow v Warde* (1794) 2 Ves 336; *Mildmay's Case* (1584) 1 Co Rep 175 a; *Cooke v Briscoe* (1838) 1 Dr & Wal 596; *Swift v Swift* (1836) 8 Sim 168; Sugden on Powers (8th Edn) 439; *Tasker v Small* (1834) 6 Sim 625.

4 *Mackinley v Sison* (1837) 8 Sim 561; *Re Jefferys' Trusts* (1872) LR 14 Eq 136. See also *Richardson v Harrison* (1885) 16 QBD 85, CA.

5 *Barrymore v Ellis* (1836) 8 Sim 1; *Medley v Horton* (1844) 14 Sim 222; but see *Brown v Bamford* (1842) 11 Sim 127; *revsd* (1846) 1 Ph 620. Contrast *Harnett v Macdougall* (1845) 8 Beav 187; *Moore v Moore* (1844) 1 Coll 54. See also *Van Grutten v Foxwell (Third Appeal)* (1901) 84 LT 545, HL.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/227. Additional or substitutional powers.

## 227. Additional or substitutional powers.

If a power of sale, jointuring<sup>1</sup> or a similar power already exists, and a second similar power is conferred on the same donee, it is in each case a question of intention whether the second power is intended to be additional or substitutional. There is a presumption of substitution if both powers are given for the same purpose and would constitute a double burden, as with powers of charging<sup>2</sup>, or if the second power is created by reference to the first<sup>3</sup>, but there is no such presumption if the powers impose no burden, as with powers of sale<sup>4</sup>.

1 As to powers of jointuring see PARA 248 et seq post.

2 See *Wigsell v Smith* (1828) 5 Russ 299.

3 *Hindle v Taylor* (1855) 5 De GM & G 577; *Cooper v Macdonald* (1873) LR 16 Eq 258; *Eustace v Robinson* (1880) 7 LR Ir 83, Ir CA; *Trew v Perpetual Trustee Co* [1895] AC 264, PC; but see also *Re Arnell*, *Re Edwards*, *Prickett v Prickett* [1924] 1 Ch 473 at 480; and the cases cited in PARA 225 note 1 ante.

4 *Boyd v Petrie* (1872) 7 Ch App 385.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(1) CREATION OF POWERS IN GENERAL/(ii) Construction of Powers/228. Void or illegal powers.

## 228. Void or illegal powers.

The object of the power may be of any nature not infringing any rule of law or equity<sup>1</sup>. It may be to revoke the limitations of the settlement, either wholly or in part, or to raise concurrent interests for different purposes; and whether the power extends to the whole or only to a part depends upon the intention appearing in the particular settlement<sup>2</sup>. The power must not be illegal, and must therefore not infringe the rule against perpetuities<sup>3</sup>. A limited power which is exercisable beyond the perpetuity period is void<sup>4</sup>, unless it relates to the administration, as opposed to the distribution, of any property<sup>5</sup>; but if in fact there are two distinct powers, one of them may be void without affecting the other<sup>6</sup>. A power is not bad for remoteness merely because some of its objects are not within the limits allowed by the law, for a valid appointment may be made among the other objects<sup>7</sup>, and limitations in default of appointment under a power which is void for remoteness are not invalid unless they themselves contravene the rule against perpetuities<sup>8</sup>.

1 *Re Hyde*, *Smith v Jack* [1932] 1 Ch 95, where Maugham J refused to hold invalid a trust for A for life or after his death for his 'children or reputed children' as he should by will or codicil appoint.

2 *Freke v Lord Barrington* (1791) 3 Bro CC 274.

3 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1090 et seq. See also *Re Watson's Settlement Trusts*, *Dawson v Reid* [1959] 2 All ER 676, [1959] 1 WLR 732; *Re Leek, Darwen v Leek* [1969] 1 Ch 563, [1968] 1 All ER 793, CA. The saving provisions of the Perpetuities and Accumulations Act 1964 only apply to an instrument made in the exercise of a special power of appointment where the instrument creating the power takes effect after the commencement of that Act on 16 July 1964: see s 15(5); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1091. A special power, for the purposes of the Act, is defined in s 7: see PARA 207 ante.

4 *Re de Sommersy, Coelenbier v de Sommersy* [1912] 2 Ch 622; *Re Blew, Blew v Gunner* [1906] 1 Ch 624; *Kennedy v Kennedy* [1914] AC 215, PC; *Re Symm's Will Trusts, Public Trustee v Shaw* [1936] 3 All ER 236; and see *Re Leek, Darwen v Leek* [1969] 1 Ch 563, [1968] 1 All ER 793, CA.

5 See the Perpetuities and Accumulations Act 1964 s 8(1); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1034.

6 *Re de Sommersy, Coelenbier v de Sommersy* [1912] 2 Ch 622; *Attenborough v Attenborough* (1855) 1 K & J 296. But see *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668, where the powers were indivisible.

7 *Attenborough v Attenborough* (1855) 1 K & J 296; *Hockley v Mawbey* (1790) 1 Ves 143 at 150; *Slark v Dakyns* (1874) 10 Ch App 35; *Griffith v Pownall* (1843) 13 Sim 393; *Re Veale's Trusts* (1876) 4 ChD 61 (affd (1877) 5 ChD 622, CA); *Davy v Clarke* [1920] 1 IR 137.

8 *Re Abbott, Peacock v Frigout* [1893] 1 Ch 54; *Re Hay, Leech v Hay* [1932] NI 215. See also *Re Canning's Will Trusts, Skues v Lyon* [1936] Ch 309; *Re Coleman, Public Trustee v Coleman* [1936] Ch 528; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1107.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(i) Powers of Sale/229. Statutory and express powers.

## **(2) CREATION OF PARTICULAR POWERS**

### **(i) Powers of Sale**

#### **229. Statutory and express powers.**

Wide powers of sale are conferred by statute in respect of land subject to a settlement under the Settled Land Act 1925<sup>1</sup> which was created before the commencement of the Trusts of Land and Appointment of Trustees Act 1996<sup>2</sup>. These statutory powers could be extended but not curtailed<sup>3</sup> and removed the necessity of inserting express powers of sale and exchange in such settlements. Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 all trustees of land have all the powers of an absolute owner in relation to the land subject to the trust for the purpose of exercising their functions as trustees<sup>4</sup>. However, these statutory powers do not apply in the case of a trust of land in so far as there is a provision to that effect that they do not apply in the disposition<sup>5</sup>. If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of the power, then the power cannot be exercised without that consent<sup>6</sup>. Further statute has conferred on executors and administrators of a deceased person the same full powers of disposition of his personal estate as they have over his chattels real<sup>7</sup> and as respects the real estate, all the powers conferred on them by Part I of the Trusts of Land and Appointment of Trustees Act 1996<sup>8</sup>.

1 See the Settled Land Act 1925 s 38(i); and SETTLEMENTS vol 42 (Reissue) PARA 827 et seq. As to powers to mortgage see MORTGAGE vol 77 (2010) PARA 167 et seq.

2 The commencement date for the Trusts of Land and Appointment of Trustees Act 1996 was 1 January 1997.

- 3 See the Settled Land Act 1925 ss 108, 109; and SETTLEMENTS vol 42 (Reissue) PARA 880 et seq.
- 4 Trusts of Land and Appointment of Trustees Act 1996 s 6(1). 'Trustees of land' means trustees of a land of trust: s 1(1)(b); and see TRUSTS vol 48 (2007 Reissue) PARA 601.
- 5 Ibid s 8(1). 'Trust of land' means any trust property which consists of or includes land: s 1(1)(a). However, the reference to land in s 1(1)(a) does not include land which is settled land or which is land to which the Universities and College Estates Act 1925 applies: Trusts of Land and Appointment of Trustees Act 1996 s 1(3); and see TRUSTS vol 48 (2007 Reissue) PARA 1035.
- 6 Ibid s 8(2); and see TRUSTS vol 48 (2007 Reissue) PARA 1035.
- 7 See the Administration of Estates Act 1925 s 39(1) (as amended); and EXECUTORS AND ADMINISTRATORS.
- 8 See the Trusts of Land and Appointment of Trustees Act 1996 Pt I (ss 1-18). See also EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(i) Powers of Sale/230. Conversion.

### 230. Conversion.

Where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property, and where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not to be regarded as land<sup>1</sup>.

- 1 Trusts of Land and Appointment of Trustees Act 1996 s 3(1). This does not apply to a trust created by a will if the testator died before 1 January 1997: s 3(2). However, subject to s 3(2), s 3(1) applies to a trust whether it is created, or arises, before or after 1 January 1997: s 3(3). See also TRUSTS vol 48 (2007 Reissue) PARAS 966-967.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(i) Powers of Sale/231. Discretion of donees.

### 231. Discretion of donees.

The donees of a power of sale are within the terms of the power if they act without improper motives and in exercise of a reasonable discretion<sup>1</sup>. A power of sale may authorise a mortgage<sup>2</sup>, and a statutory power to mortgage is given to trustees of land for the purpose of exercising their functions in relation to land<sup>3</sup>.

- 1 As to the mode of exercising powers of sale see TRUSTS vol 48 (2007 Reissue) PARA 1041 et seq.
- 2 See the cases cited in MORTGAGE vol 77 (2010) PARA 175; and see *Re Dimmock, Dimmock v Dimmock* (1885) 52 LT 494; *Re Bellinger, Durell v Bellinger* [1898] 2 Ch 534; *Walker v Southall, Southall v Walker* (1887) 56 LT 882; and PARA 271 post.
- 3 See the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and TRUSTS vol 48 (2007 Reissue) PARA 1035.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/232. Statutory and express powers.

## (ii) Powers of Leasing

### 232. Statutory and express powers.

Limited owners of settled land have the powers of leasing conferred on them by the Settled Land Act 1925<sup>1</sup>. In addition, limited owners may exercise any express powers contained in the settlement so long as these do not conflict with or restrict the statutory powers<sup>2</sup>. Trustees of land have all the powers of an absolute owner in relation to land subject to the trust for the purpose of exercising their functions as trustees<sup>3</sup>. However, these statutory powers do not apply in the case of a trust of land in so far as there is a provision to that effect that they do not apply in the disposition<sup>4</sup>. Trustees of land include trustees of settlements created after 1 January 1997<sup>5</sup> and trustees of settlements created before that date where all the land and heirlooms<sup>6</sup> have been disposed of, for example by sale<sup>7</sup>.

1 See the Settled Land Act 1925 ss 41-48 (s 44 as amended); and SETTLEMENTS vol 42 (Reissue) PARA 837 et seq.

2 See *ibid* ss 108, 109; and SETTLEMENTS vol 42 (Reissue) PARA 880 et seq. For the power to grant building, mining and forestry leases, and the requirements relating to the valid exercise of trustees' power to grant leases see SETTLEMENTS vol 42 (Reissue) PARA 837 et seq. For trustees' power to grant leases generally, and the validation of a defective exercise of the power of leasing see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 30 et seq. For the leasing power of charity trustees see CHARITIES vol 8 (2010) PARA 395 et seq.

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and TRUSTS vol 48 (2007 Reissue) PARA 1035. For the meaning of 'trustees of land' see PARA 229 note 4 ante.

4 See *ibid* s 8(1); and TRUSTS vol 48 (2007 Reissue) PARA 1035. For the meaning of 'trust of land' see PARA 229 note 5 ante.

5 See *ibid* s 2(1); and SETTLEMENTS vol 42 (Reissue) PARA 609. See also PARA 229 note 2 ante.

6 See the Settled Land Act 1925 s 67(1); and SETTLEMENTS vol 42 (Reissue) PARA 941.

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(4); and SETTLEMENTS vol 42 (Reissue) PARA 676.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/233. Construction in general.

### 233. Construction in general.

Where a question arises as to the extent of the power of leasing, the intention of the parties creating the powers must in each case govern, the court having regard to the whole of the document creating the power, and the nature of the property. As a result general words may be limited accordingly<sup>1</sup>. Where a lease is granted by the grantor, in the exercise of all his enabling powers, the lease usually takes effect under the power which is first in point of time, but in some cases it is proper to ascribe the lease to the power which is most advantageous to the limited owner<sup>2</sup>. Under a power to lease 'to any person or persons', a lease may be granted to a limited company<sup>3</sup>.

1 See Sugden on Powers (8th Edn) 728, 734; *Baggott v Oughton* (1724) 8 Mod Rep 250; *Pomery v Partington* (1790) 3 Term Rep 665. See also *Lord Mountjoy's Case* (1589) 5 Co Rep 3b.

2 *Earl of Lonsdale v Lowther* [1900] 2 Ch 687 at 697.



3 *Re Jeffcock's Trusts* (1882) 51 LJ Ch 507.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/234. Leasing a usual power.

### **234. Leasing a usual power.**

A power of leasing is a 'usual power' within the meaning of an agreement to make a settlement with all the usual powers<sup>1</sup>. If leases of a particular term are mentioned, however, the court does not infer from general words that larger powers are intended<sup>2</sup>.

1 *Hill v Hill* (1834) 6 Sim 136; *Duke of Bedford v Marquess of Abercorn* (1836) 1 My & Cr 312; *Turner v Sargent* (1853) 17 Beav 515; *Scott v Steward* (1859) 27 Beav 367. As to delegation of a power of leasing see PARA 291 post. As to the periods for which leases may be granted see PARAS 239-242 post.

2 *Pearse v Baron* (1821) Jac 158. See also *Brewster v Angell* (1820) 1 Jac & W 625.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/235. Land included in power.

### **235. Land included in power.**

In settlements where the trustees' leasing powers have not been statutorily extended to that of an absolute owner<sup>1</sup>, no land can be leased under a power except that which is subject to the power<sup>2</sup>. Thus a general power to lease land, or any part of it, does not authorise a lease of a wayleave or other liberties<sup>3</sup>, or of part of the land with an easement over the rest<sup>4</sup>. A lease at a single rent of property that is subject to the power with property that is not subject to it will usually be invalid<sup>5</sup>. The same result follows where the rent reserved is that required for the land within the power and includes nothing for the other land<sup>6</sup>. But this does not apply if rent is reserved according to the quantity or produce of the land, or if, under a power requiring the best rent to be reserved, the rent apportioned to the land within the power is the best rent of that land<sup>7</sup>.

1 Eg as a result of all the settled land having been disposed of (see the Trusts of Land and Appointment of Trustees Act 1996 s 2(4)); or where the settlement was created after 1 January 1997 (see s 2(1)). See also PARA 232 ante.

2 *Tolson v Sheard* (1877) 5 ChD 19, CA; *King v Bird* [1909] 1 KB 837; *Re Rycroft's Settlement, Rycroft v Rycroft* [1962] Ch 263, [1961] 3 All ER 581.

3 *Ricketts v Bell* (1847) 1 De G & Sm 335.

4 *Dayrell v Hoare* (1840) 12 Ad & El 356.

5 *Earl of Cardigan v Montague* (1754) Sugden on Powers (8th Edn) 918; *Rees d Perkins v Phillip* (1810) Wight 69; *Doe d Bartlett v Rendle* (1814) 3 M & S 99; *Doe d Lord Egremont v Stephens* (1844) 6 QB 208. See also *Doe d Vaughan v Meyler* (1814) 2 M & S 276; *Muskerry v Chinnery* (1835) L & G temp Sugd 185 at 230 (on appeal sub nom *Sheehy v Lord Muskerry* (1839) 7 Cl & Fin 1, HL); *Re Rycroft's Settlement, Rycroft v Rycroft* [1962] Ch 263, [1961] 3 All ER 581.

6 *Doe d Bartlett v Rendle* (1814) 3 M & S 99.

<sup>7</sup> *Campbell v Leach* (1775) Amb 740; *Doe d Douglas v Lock* (1835) 2 Ad & El 705 at 747. See also *Doe d Earl of Shrewsbury v Wilson* (1822) 5 B & Ald 363; *Doe d Earl of Egremont v Williams and Hole* (1848) 11 QB 688; Sugden on Powers (8th Edn) 810.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/236. Building and repairing leases.

### **236. Building and repairing leases.**

In a settlement where there is a power which has not been statutorily extended<sup>1</sup> to grant building leases, the lease must impose an obligation to build; hence a mere repairing lease is not justified by the power<sup>2</sup>. Under a power to grant repairing leases, the lease need not specify particular repairs or a particular sum to be spent in repairs; it is sufficient that it contains the usual covenants to repair and to yield up in repair<sup>3</sup>. If the power requires that the lessee is not to be made dispunishable for waste, the lease must not contain a covenant by the lessor to repair<sup>4</sup>; but, for this purpose, a provision for the lessee to pull down buildings and rebuild them does not permit waste<sup>5</sup>.

<sup>1</sup> See PARA 235 note 1 ante.

<sup>2</sup> *Jones d Cowper v Verney* (1739) Willes 169; *Hallett to Martin* (1883) 24 ChD 624.

<sup>3</sup> *Easton v Pratt* (1864) 2 H & C 676, Ex Ch; *Truscott v Diamond Rock Boring Co* (1882) 20 ChD 251, CA.

<sup>4</sup> *Yellowly v Gower* (1855) 11 Exch 274.

<sup>5</sup> *Doe d Lord Egremont v Stephens* (1844) 6 QB 208; *Morris v Rhydydefed Colliery Co* (1858) 3 H & N 885, Ex Ch. As to a clause permitting waste where the power is unlimited see *Muskerry v Chinnery* (1835) L & G temp Sugd 185 at 228 (on appeal sub nom *Sheehy v Lord Muskerry* (1839) 7 Cl & F 1, HL); *Sheehy v Lord Muskerry* (1848) 1 HL Cas 576. As to liability for waste generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 434.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/237. Mining leases.

### **237. Mining leases.**

If the power<sup>1</sup> does not mention mines, a lease may be made of open mines, but not of unopened mines<sup>2</sup>; if the power mentions mines generally, and there are any open mines on the land, then these only can be leased; but if there are no open mines a lease may be made of unopened mines<sup>3</sup>. A power to lease with all necessary and usual liberties authorises the grant of liberty to erect cottages<sup>4</sup>; and powers to lease for building purposes and to lease mines with or without the surface authorise the grant of a lease for building purposes with a reservation of mines and minerals<sup>5</sup>.

<sup>1</sup> I.e. one contained in a settlement to which the Trusts of Land and Appointment of Trustees Act 1996 s 6(1) does not apply: see PARA 235 ante.

<sup>2</sup> For the meaning of 'mine' and 'open mine' see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 5-8. As to the mode of working mines under a power see *Jegon v Vivian* (1871) 6 Ch App 742. As to the apportionment of the produce of mines between tenant for life and remainderman see SETTLEMENTS vol 42 (Reissue) PARA 947.

3 *Clegg v Rowland* (1866) LR 2 Eq 160; *Re Baskerville, Baskerville v Baskerville* [1910] 2 Ch 329; *Re Harter, Harter v Harter* [1913] WN 104. But see *Re Barker, Wallis v Barker* (1903) 88 LT 685.

4 *Morris v Rhydydefed Colliery Co* (1858) 3 H & N 885, Ex Ch.

5 *Re Duke of Rutland's Settled Estates, Duke of Rutland v Marquis of Bristol* [1900] 2 Ch 206.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/238. Land usually demised.

### 238. Land usually demised.

A power to lease land usually demised authorises the inclusion in one lease of land which has previously been leased separately<sup>1</sup>, but not the demise of land which has not been leased for a considerable period, such as 20 years<sup>2</sup>; and it will be a breach of trust to include in one lease properties which belong to different trusts<sup>3</sup>. A direction that the usual rents are to be reserved similarly prohibits a lease of property which has not been previously let<sup>4</sup>. If the intention is clear, however, a lease of premises not previously demised will be upheld<sup>5</sup>.

1 *Doe d Lord Egremont v Stephens* (1844) 6 QB 208.

2 Sugden on Powers (8th Edn) 728; and see Co Litt 44 b.

3 *Tolson v Sheard* (1877) 5 ChD 19, CA; *Re Rycroft's Settlement, Rycroft v Rycroft* [1962] Ch 263, [1961] 3 All ER 581.

4 *Pomery v Partington* (1790) 3 Term Rep 665; *Doe d Bartlett v Rendle* (1814) 3 M & S 99.

5 *Waker v Wakeman* (1675) 2 Lev 150; *Cumberford's Case* (1635) 2 Roll Abr 262 pl 15; *Winter v Loveden* (1697) 1 Com 37 at 41; *Doe d Lord Egremont v Stephens* (1844) 6 QB 208; *Doe d Bartlett v Rendle* (1814) 3 M & S 99.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/239. Period of lease.

### 239. Period of lease.

Apart from the provisions in the Settled Land Act 1925<sup>1</sup> and the Trusts of Land and Appointment of Trustees Act 1996<sup>2</sup>, the period for which leases may be granted is determined by the intention of the donor as gathered from the terms of the instrument creating the power<sup>3</sup>. Subject to that general principle, where a power is added to a life interest the presumption is that the power is different from and in excess of that which would have arisen as a mere accessory to the life interest<sup>4</sup>. Further, an indefinite power of leasing usually authorises leases for any period, however long<sup>5</sup>. Charities were, however, an exception to this rule and, if the court considered that the execution of the trust was not prudent, the lessee was held to be a trustee<sup>6</sup>. Further, where trustees for charities granted a lease that was inconsistent with good management, the lease could be set aside, unless the person taking under it could show that it was, in the circumstances, a reasonable transaction<sup>7</sup>.

A power to lease for 21 years authorises a lease for any term not exceeding 21 years<sup>8</sup>, or a lease determinable within that period at the option of the lessor or lessee<sup>9</sup>.

1 See the Settled Land Act 1925 s 41; and SETTLEMENTS vol 42 (Reissue) PARA 837.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and TRUSTS vol 48 (2007 Reissue) PARA 1035. See also PARA 232 ante. For the position of charity trustees see the Charities Act 1993 s 36; and CHARITIES vol 8 (2010) PARA 395 et seq.

3 See *Vivian v Jegon* (1868) LR 3 HL 285; *Sheehy v Lord Muskerry* (1848) 1 HL Cas 576 at 593.

4 *Hele v Greene* (1651) 2 Roll Abr 261 pl 10. Contrast *Vivian v Jegon* (1868) LR 3 HL 285.

5 *Sheehy v Lord Muskerry* (1848) 1 HL Cas 576; *Re James, James v Gregory* (1895) 64 LJ Ch 686, CA; and see *A-G v Moses* (1817) 2 Madd 294; *Re O'Brien's Estate* (1869) IR 3 Eq 77; *Mostyn v Lancaster, Taylor v Mostyn* (1883) 23 ChD 583, CA.

6 *A-G v Moses* (1817) 2 Madd 294; *A-G v Green* (1801) 6 Ves 452.

7 *A-G v Pilgrim* (1849) 12 Beav 57; *A-G v Hall* (1853) 16 Beav 388; *Bishop of Bangor v Parry* [1891] 2 QB 277; *Rickard v Graham* [1910] 1 Ch 722.

8 *Isherwood v Oldknow* (1815) 3 M & S 382.

9 *Edwards v Millbank* (1859) 4 Drew 606; *King v Bird* [1909] 1 KB 837; and see *Sheehy v Lord Muskerry* (1848) 1 HL Cas 576. This had been doubted in *Lowe v Swift* (1814) 2 Ball & B 529 at 536.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/240. Perpetually renewable leases.

## **240. Perpetually renewable leases.**

Powers to grant perpetually renewable leases or underleases have effect in regard to grants made after 1925<sup>1</sup> as if they authorised leases or underleases for a term not exceeding 2,000 years at the best rent that can reasonably be obtained having regard to any fine which may be taken and to all the circumstances of the case, or, if the power authorises a grant at a peppercorn rent or other rent less than the best rent, then at any rent so authorised<sup>2</sup>.

1 See the Law of Property Act (Postponement) 1924 s 1 (repealed).

2 Law of Property Act 1922 s 145, Sch 15 para 8(1). See also Sch 15 para 5; *Re Hopkins' Lease, Caerphilly Concrete Products Ltd v Owen* [1972] 1 All ER 248, [1972] 1 WLR 372, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 540-541. As to the saving for the power to grant leases of allotments and smallholdings with rights of renewal see Sch 15 para 9; and AGRICULTURAL LAND vol 1 (2008) PARAS 527, 543.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/241. Leases for life.

## **241. Leases for life.**

Every power of leasing at a rent or in consideration of a fine for life or lives, or for any term of years determinable with life or lives or on the marriage of any person, has effect in regard to grants made after 1925<sup>1</sup> as if the power authorised grants for a term not exceeding 90 years determinable by notice after the death or marriage, as the case may be, of the original lessee or of the survivor of the original lessees<sup>2</sup>.

1 See the Law of Property Act (Postponement) 1924 s 1 (repealed).

<sup>2</sup> See the Law of Property Act 1922 s 145, Sch 15 para 8(2); the Law of Property Act 1925 s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/242. Excessive length.

## 242. Excessive length.

Where, in the exercise of a power of leasing granted by any instrument or statute, a lease<sup>1</sup> is granted which is invalid because it does not comply with the terms of the power, the lease may nevertheless take effect in equity as a contract for the grant of a valid lease, with such variations as are necessary to comply with the terms of the power, and will bind the beneficial interests of the grantor and reversioners<sup>2</sup>. This saving provision only applies to leases made in good faith, when the tenant has taken possession<sup>3</sup>.

<sup>1</sup> 'Lease' includes an underlease or other tenancy (Law of Property Act 1925 s 154); but not a lease of land held on charitable, ecclesiastical or public trusts (s 152(7)).

<sup>2</sup> Ibid s 152(1). See *Kisch v Hawes Bros Ltd* [1935] Ch 102 (overruled on another point in *Warner v Sampson* [1959] 1 QB 297, [1959] 1 All ER 120, CA); explained in *Davies v Hall* [1954] 2 All ER 330, [1954] 1 WLR 855, CA. See also *Re Morgan's Lease, Jones v Norsesowicz* [1972] Ch 1, [1971] 2 All ER 235. As to excessive execution see PARAS 353-358 post. As to the protection of lessees from charity trustees see the Charities Act 1993 s 37(3), (4); and CHARITIES vol 8 (2010) PARA 397.

<sup>3</sup> See the Law of Property Act 1925 s 152(1).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/243. Reversionary and future leases.

## 243. Reversionary and future leases.

A power to grant leases in possession is not well exercised by a lease in reversion<sup>1</sup>. For this purpose 'possession' includes receipt of rent<sup>2</sup>, although a concurrent lease (namely a lease commencing at once but taking effect only after the determination of a subsisting lease<sup>3</sup>) is not a lease in possession<sup>4</sup>. Further, a power to lease which specifies no time for commencement normally authorises only a lease commencing forthwith<sup>5</sup>, although it may be possible to construe the power as expressly or by implication authorising a lease to commence at some future time<sup>6</sup>. The court generally leans against a construction by which a right would be divested or a forfeiture incurred<sup>7</sup>, and in order to support a lease in possession, to commence forthwith<sup>8</sup>, may presume the surrender of an existing lease<sup>9</sup>. But it seems doubtful whether a power to grant leases in possession and reversion authorises both a lease in possession and a lease in reversion of the same land<sup>10</sup>. If only leases in possession are authorised, the donee may grant neither a lease in reversion expectant upon the determination of an existing lease nor a lease to commence at a future time<sup>11</sup>. An option to renew a lease of settled land may be granted<sup>12</sup>. The option must be made exercisable within an agreed number of years not exceeding ten<sup>13</sup>. The grant must be at the best rent obtainable<sup>14</sup>, ascertained at the date when the option is granted<sup>15</sup>.

<sup>1</sup> *Opy v Thomasius* (1665) 1 Lev 167. See also Sugden on Powers (8th Edn) 752.

<sup>2</sup> *Goodtitle v Funucan* (1781) 2 Doug KB 565.

- 3 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 104.
- 4 Shep Touch (8th Edn) 270 note (a); Sugden on Powers (8th Edn) 768-777; but see *Goodtitle v Funucan* (1781) 2 Doug KB 565; *Duckett v Keene* [1903] 1 IR 409, Ir CA.
- 5 *Countess of Sussex v Wroth* (1582) Cro Eliz 5; *Fitzwilliam's Case* (1604) 6 Co Rep 32a at 33a; *Shecomb v Hawkins* (1613) Cro Jac 318; *Bowes v East London Waterworks* (1818) 3 Madd 375; *Doe d Allan v Calvert* (1802) 2 East 376; *Leslie v Crommelin* (1867) IR 2 Eq 134; and see *Doe d Mount v Roberts* (1785) 4 Doug KB 306.
- 6 *Earl of Coventry v Countess Dowager of Coventry* (1718) Com 312; Sugden on Powers (8th Edn) 753.
- 7 *Dowling v Foxall* (1809) 1 Ball & B 193 at 196.
- 8 *Countess Dowager of Cavan v Doe d Pulteney* (1795) 6 Bro Parl Cas 175, HL; and see *Doe d Allan v Calvert* (1802) 2 East 376; *Roe d Brune v Prideaux* (1808) 10 East 158.
- 9 *Goodtitle v Funucan* (1781) 2 Doug KB 565 at 572; *Nixon v Robinson* (1844) 2 Jo & Lat 4; and see *Lefroy v Walsh* (1851) 1 ICLR 311; *Brinkley v M'Munn* (1893) 32 LR Ir 532. But if the new lease is also void as not complying with the terms of the power in other respects, the original lease will not be surrendered: see *Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 632, 634.
- 10 See *Winter v Loveden* (1697) 1 Com 37 at 39; *Doe d Sutton v Harvey* (1823) 1 B & C 426.
- 11 *Doe d Allan v Calvert* (1802) 2 East 376, where a term to commence as to part of the land on a day after the deed creating it was held to be wholly bad. For the effect of particular phrases in the habendum see Co Litt 46b; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 236.
- 12 See the Settled Land Act 1925 s 51(1).
- 13 Ibid s 51(2).
- 14 See ibid s 51(3).
- 15 See ibid s 51(1); *Re Morgan's Lease, Jones v Norsesowicz* [1972] Ch 1, [1971] 2 All ER 235; distinguishing *Re Rycroft's Settlement, Rycroft v Rycroft* [1962] Ch 263, [1961] 3 All ER 581.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/244. Best rent.

#### **244. Best rent.**

A settlement<sup>1</sup> creating a power of leasing usually in terms requires the best rent to be reserved, and, even if it did not, such a requirement would probably be implied<sup>2</sup>. The statutory leasing powers for settlements provide that every lease is to reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case<sup>3</sup>. A mere reservation of the 'improved rent', in general terms and without quantifying it, is not enough<sup>4</sup>; and a rent cannot be the 'best rent' if the lessor obtains some additional benefit for himself, for he must get 'as much for others, as he has for himself'<sup>5</sup>. However, the rent must be considered in relation to the surrounding circumstances, so that it does not fail to be the 'best' merely because there was an offer of a higher rent<sup>6</sup>, or because it is reserved in kind<sup>7</sup>, or, in a mining lease, varies with the selling price of the mineral where that is the custom of the district<sup>8</sup>; and the rent may reflect the value of any lease surrendered in return for granting the lease<sup>9</sup>. It is not necessary to take into account against the tenant any increase in the value of his land arising from any tenant's improvements<sup>10</sup> when estimating the best rent or reservation in the nature of rent comprised in a farm business tenancy<sup>11</sup> for the purposes of any Act of Parliament, deed or other instrument which authorises a lease to be made on condition that the best rent or reservation in the nature of rent is reserved<sup>12</sup>. A power which requires the 'usual rent' to be

reserved is construed as requiring the reservation of the best rent, unless 'usual' is used in contradistinction to 'best' or 'most'<sup>13</sup>. If the reservation of 'ancient rent' is required, this is taken as the rent reserved at the date when the power was created or, if none, the rent last reserved before that date<sup>14</sup>.

- 1 As to the powers of trustees of land exercising their functions as trustees see PARA 232 ante.
- 2 See Farwell on Powers (3rd Edn) 660; but see *Mostyn v Lancaster* (1883) 23 ChD 583, CA.
- 3 Settled Land Act 1925 s 42(1)(ii); and see SETTLEMENTS vol 42 (Reissue) PARA 839. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 30.
- 4 *Lady Orby v Lady Mohun* (1706) 2 Vern 531 at 542.
- 5 *Montgomery v Charteris (Earl of Wemyss)* (1817) 5 Dow 293 at 344, HL, per Lord Eldon LC.
- 6 *Doe d Lawton v Radcliffe* (1808) 10 East 278. See also *Dyas v Cruise* (1845) 2 Jo & Lat 460; *Campbell v Leach* (1775) Amb 740; *Basset v Basset* (1744) Amb 843; *Chandler v Bradley* [1897] 1 Ch 315.
- 7 *Campbell v Leach* (1775) Amb 740.
- 8 *Earl of Lonsdale v Lowther* [1900] 2 Ch 687.
- 9 See *Re Rawlins' Estate* (1865) LR 1 Eq 286; *Ellard v Lord Llandaff* (1810) 1 Ball & B 241; Sugden on Powers (8th Edn) 787.
- 10 See the Agricultural Tenancies Act 1995 s 15; and AGRICULTURAL LAND vol 1 (2008) PARA 310.
- 11 See *ibid* s 1; and AGRICULTURAL LAND vol 1 (2008) PARA 302.
- 12 *Ibid* s 34(1); and see AGRICULTURAL LAND vol 1 (2008) PARA 309.
- 13 *Doe d Newnham v Creed* (1815) 4 M & S 371.
- 14 *Roe d Brune v Rawlings* (1806) 7 East 279. See also *Doe d Earl of Egremont v Grazebrook* (1843) 4 QB 406; *Doe d Biddulph v Hole* (1850) 15 QB 848.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/245. Reservation of rent.

## 245. Reservation of rent.

Even if the power provides that the rent is to be incident to the reversion, it is not necessary that the reservation should be expressly to the tenant for life and after his death to the persons entitled in remainder, for the lease has its essence from the instrument out of which the lessor's estate is derived, and it precedes the estate for life and the remainders<sup>1</sup>. However, the safest way is to reserve rent yearly during the term and leave the law to make the distribution<sup>2</sup>.

- 1 *Whitlock's Case* (1609) 8 Co Rep 69 b; *Isherwood v Oldknow* (1815) 3 M & S 382.
- 2 *Whitlock's Case* (1609) 8 Co Rep 69 b; *Greenaway v Hart* (1854) 14 CB 340; *Rogers v Humphreys* (1835) 4 Ad & El 299. See also *Lord Tankerville v Wingfield and Pritchard* (1773) 7 Price 343 n; *Clere's Case* (1600) 6 Co Rep 17b; *Robertson v Walker* (1875) 44 LJ Ch 220; but see *Yellowly v Gower* (1855) 11 Exch 274. As to the incidence of rent see further the Law of Property Act 1925 s 141(1); and the Landlord and Tenant (Covenants) Act 1995 s 15, which applies to new tenancies (for the meaning of which see s 1(3)). See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 554 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/246. Right of re-entry.

### 246. Right of re-entry.

The right to re-enter for the non-payment of rent and non-performance of covenants<sup>1</sup> entered into by the lessee follows the same rule and passes to the persons entitled to the reversion<sup>2</sup>. When the power is silent as to the condition for re-entry for non-payment of rent, reasonable time and reasonable circumstances may be introduced into the clause conferring the right of re-entry<sup>3</sup>; and although express mention in the power of a time prevents further time being allowed, reasonable qualifications may be inserted<sup>4</sup>.

1 A proviso for re-entry for non-payment of rent is, but such a proviso on breach of any other covenant is not, a 'usual' clause: see *Hodgkinson v Crowe* (1875) 10 Ch App 622; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 83.

2 *Hotley v Scot* (1773) Lofft 316; *Basset v Basset* (1744) Amb 843; *Maundrell v Maundrell* (1805) 10 Ves 246; *Greenaway v Hart* (1854) 14 CB 340. See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 556.

3 *Smith v Doe d Jersey* (1821) 3 Bli 290, HL; *Doe d Earl of Shrewsbury v Wilson* (1822) 5 B & Ald 363; and see *Doe d Wythe v Rutland* (1837) 2 M & W 661; but see the Settled Land Act 1925 s 42(1)(iii).

4 *Lord Tankerville v Wingfield and Pritchard* (1773) 7 Price 343 n; and see *Doe d Douglas v Lock* (1835) 2 Ad & El 705; *Doe d Lord Egremont v Burrough* (1844) 6 QB 229.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(ii) Powers of Leasing/247. 'Usual' provisions.

### 247. 'Usual' provisions.

If a power requires leases to contain the usual reservations or exceptions, the distinction between exceptions and reservations must be noted<sup>1</sup>. Further, powers frequently require the insertion of usual covenants. If the power authorises leases at rackrents, the usual covenants are those which are usual between lessor and lessee, but if the power authorises beneficial leases the word 'usual' is construed with reference to its bearing on the relative rights of the tenant for life and remainderman, and the lease in existence at the time of the creation of the power is taken as the guide<sup>2</sup>. The lease may be invalidated not only by the omission of proper covenants but also by the insertion of improper covenants<sup>3</sup>.

1 As to the nature of exceptions and reservations and as to when a counterpart lease is essential see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 115, 167-168.

2 See 3 Davidson's Precedents in Conveyancing (3rd Edn) 501-502 note (o). For the usual covenants see LANDLORD AND TENANT vol 27(1) (Reissue) PARA 61.

3 See *Doe d Bromley v Bettison* (1810) 12 East 305. As to validation under the Law of Property Act 1925 s 152 see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 145.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/248. Meaning of 'jointure'.

### (iii) Powers of Jointuring



## 248. Meaning of 'jointure'.

A jointure is prima facie an estate for life given to a wife to take effect immediately upon the death of her husband<sup>1</sup>. The power to jointure is not a 'usual power' within the meaning of an agreement to make a settlement with all the usual powers<sup>2</sup>. Frequently, settlements which give a husband a life interest, will also give him a power to create a life interest in favour of his spouse out of all or part of his own interest.

1 *Re de Hoghton, de Hoghton v de Hoghton* [1896] 2 Ch 385; *Greenwood v Lutman* [1915] 1 IR 266; but see *Jamieson v Trevelyan* (1854) 10 Exch 269, where, on the construction of a particular will, the court held that a power to jointure allowed the creation of a jointure during the life of the husband. As to jointure generally see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 785; SETTLEMENTS vol 42 (Reissue) PARA 725.

2 *Hill v Hill* (1834) 6 Sim 136 at 145; *Wright v Wright* [1904] 1 IR 360; but see *Higginson v Barneby* (1826) 2 Sim & St 516; *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543. As to the effect of an express power to jointure upon the insertion of a power to charge see PARA 257 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/249. Construction of power.

## 249. Construction of power.

The power to jointure, although a burden on the estate, is construed liberally<sup>1</sup>, and equity aids a defective execution of the power<sup>2</sup>. The question whether a particular power can be exercised in favour of a second wife depends on the construction of the power in question<sup>3</sup>, but it is not usual to restrict it to one wife<sup>4</sup>. However, the power may be so worded that the person claiming must answer the description of the appointor's wife at his death, and be not then divorced from him<sup>5</sup>.

1 *Countess of Coventry v Earl of Coventry* (1724) 2 P Wms 222; *Mills v Mills* (1845) 8 I Eq R 192.

2 See PARA 359 et seq post.

3 *Re Burrowes' Estate* (1868) IR 2 Eq 468; *Dillon v Dillon* (1847) 11 I Eq R 423; *Re Creagh's Estate, Lane, Petitioner* (1890) 25 LR Ir 128. See also *Mills v Mills* (1845) 8 I Eq R 192; *Re Hancock, Malcolm v Burford-Hancock* [1896] 2 Ch 173, CA.

4 *Hervey v Hervey* (1739) 1 Atk 561; *Zouch d Woolston v Woolston* (1761) 2 Burr 1136; *Maultby v Maultby* (1852) 2 I Ch R 32; *Barron v Constable* (1858) 7 I Ch R 467; *Mason v Mason* (1870) IR 5 Eq 288; *Bevan v Bevan* (1883) 13 LR Ir 53; *Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165, CA. But see *Allanson v Clitherow* (1747) 1 Ves Sen 24.

5 *Bullmore v Wynter* (1883) 22 ChD 619; *Re Morrieson, Hitchins v Morrieson* (1888) 40 ChD 30; *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA; *Re Slaughter, Trustees Corp'n Ltd v Slaughter* [1945] Ch 355, [1945] 2 All ER 214; *Re Allan, Allan v Midland Bank Executor and Trustee Co Ltd* [1954] Ch 295, [1954] 1 All ER 646, CA. See also *Re Coley, Hollinshead v Coley* [1903] 2 Ch 102, CA; *Blount v Crozier* [1917] 1 IR 461.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/250. Contingency of power.

## 250. Contingency of power.

The right to exercise the power to jointure is usually made contingent upon the donee coming into possession; but, if the donee covenants to exercise the power even before that event happens and afterwards comes into possession, the court will aid the covenantee if the donee fails to appoint<sup>1</sup> or is prevented from so doing by incapacity<sup>2</sup>. However, if the donee never comes into possession, the contingency on which the power is dependent has not happened and equity can give no aid; and the power cannot be accelerated by collusion between the donee and the previous life tenant<sup>3</sup>.

1 *Holingshead v Holingshead* (1708) cited in 1 Stra at 604; *Alford v Alford* (1709) cited in 1 Stra at 604; *Countess of Coventry v Earl of Coventry* (1724) 2 P Wms 222; *Jackson v Jackson* (1793) 4 Bro CC 462; *Shannon v Bradstreet* (1803) 1 Sch & Lef 52 at 63; *Re Lambert's Estate* [1901] 1 IR 261 at 268, Ir CA; *Charlton v Charlton* [1906] 2 Ch 523; and see *Johnson v Touchet* (1867) 16 WR 71. It would seem that these covenants are a good execution in equity upon the happening of the contingency on the principle that they are specifically enforceable: see PARAS 285-286, 334-336 post.

2 *Affleck v Affleck* (1857) 3 Sm & G 394.

3 *Truell v Tysson* (1856) 21 Beav 437.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/251. Enforcement of covenant.

### **251. Enforcement of covenant.**

A covenant to exercise the power to jointure may be enforced by an action for specific performance, and if the donee refuses to execute the deed in accordance with the decree the court will declare him a trustee of the estates subject to the power, and will appoint someone to execute the appointment for him<sup>1</sup>. If the donee covenants for a jointure of a given value, his estate is liable to make good a deficiency<sup>2</sup> unless the court is satisfied that the covenant was entered into by mistake of all parties<sup>3</sup>. A recital in a deed may amount to a covenant, but the court is unwilling so to construe a recital<sup>4</sup>.

1 *Wellesley v Wellesley, ex p Countess of Mornington* (1853) 4 De GM & G 537. As to specific performance generally see SPECIFIC PERFORMANCE.

2 *Probert v Morgan and Clifford* (1739) 1 Atk 440.

3 *Lady Londonderry v Wayne* (1763) Amb 424. See also MISTAKE vol 77 (2010) PARA 52 et seq.

4 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 reissue) PARA 217 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/252. Exoneration of jointure from deductions.

### **252. Exoneration of jointure from deductions.**

Formerly, it was common to give power to appoint land, not exceeding a certain value, by way of jointure<sup>1</sup>, but the modern practice is to appoint a rentcharge not exceeding a certain amount; the older form did not authorise an appointment free from taxes<sup>2</sup>. Where land of a given value is to be settled, the taxes from which the jointure is free are to be ascertained at

the time of the execution of the power<sup>3</sup>. The appointment of all or part of a husband's interest in settled funds to his wife, who is domiciled in the United Kingdom, does not give rise to any liability to inheritance tax<sup>4</sup>.

1 As to jointure see PARA 248 ante.

2 *Hervey v Hervey* (1739) 1 Atk 561; *Lady Londonderry v Wayne* (1763) Amb 424; and see PARAS 272, 354 post. For the effect of exonerating expressions on liability to income tax see INCOME TAXATION vol 23(1) (Reissue) PARA 527.

3 *Lord Tyrconnell v Duke of Ancaster* (1754) Amb 237; *Trevor v Trevor* (1842) 13 Sim 108 at 136 (on appeal (1847) 1 HL Cas 239); but see *Lady Londonderry v Wayne* (1763) Amb 424 at 427.

4 See the Inheritance Tax Act 1984 s 53(4); and INHERITANCE TAXATION vol 24 (Reissue) PARAS 488-489. For the meaning of 'United Kingdom' see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/253. Jointure arises from day to day.

### **253. Jointure arises from day to day.**

A jointure arises out of the rents and profits from land from day to day, and the power cannot be properly exercised by appointing a sum to be paid immediately upon the appointor's death<sup>1</sup>.

1 *Purcell v Purcell* (1842) 2 Dr & War 217.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/254. Settlement of wife's property in proportion to jointure.

### **254. Settlement of wife's property in proportion to jointure.**

Where there is power to appoint a jointure in proportion to the amount of a wife's property, the transaction must be fair and the wife's future property brought in and not paid to her own use; but it is not necessary that it should actually be paid to and spent by the husband<sup>1</sup>. Further, a power to appoint a jointure of such amount as a husband thinks expedient in proportion to his wife's property authorises an appointment even if the wife brings no property<sup>2</sup>.

1 *Lord Tyrconnell v Duke of Ancaster* (1754) Amb 237 at 238.

2 *Re Molton* (1852) 2 ICLR 634. See also *Earl of Tankerville v Coke* (1729) Mos 146; *Edgeworth v Edgeworth* (1829) Beat 328.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iii) Powers of Jointuring/255. Termination.

### **255. Termination.**

A jointure terminates on the death of the widow or, if the appointment so directs, on her remarriage, but a wife does not forfeit her jointure by committing adultery<sup>1</sup>.

<sup>1</sup> *Sidney v Sidney* (1734) 3 P Wms 269; *Re Walker* (1835) L & G temp Sugd 299 at 326; *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iv) Powers of Charging Portions/256. Not a 'usual power'.

#### **(iv) Powers of Charging Portions**

##### **256. Not a 'usual power'.**

A power to charge portions<sup>1</sup>, unlike a power of advancement<sup>2</sup>, is not a 'usual power' within the meaning of an agreement to make a settlement with all the usual powers.

<sup>1</sup> See *Higginson v Barneby* (1826) 2 Sim & St 516. For the meaning of 'portions' and as to portions generally see SETTLEMENTS vol 42 (Reissue) PARA 727 et seq. For the position and liabilities of the tenant for life of an estate subject to portions see SETTLEMENTS vol 42 (Reissue) PARA 767.

<sup>2</sup> See *Mayn v Mayn* (1867) LR 5 Eq 150. Such a power is inconsistent with a joint tenancy among the children: *Taggart v Taggart* (1803) 1 Sch & Lef 84 at 88; *L'Estrange v L'Estrange* [1902] 1 IR 467, Ir CA; *Re Dunn, Carter v Barrett* [1916] 1 Ch 97; *Re Ward, Partridge v Hoare-Ward* [1920] 1 Ch 334. As to powers of advancement see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 73 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iv) Powers of Charging Portions/257. Construction.

##### **257. Construction.**

The question whether or not there is power to charge portions turns on the construction of the particular document. Thus the express mention of the power to jointure<sup>1</sup> may negative the insertion of a power to charge<sup>2</sup>, and a mere covenant to settle an estate on the issue of the marriage excludes the power. Such a covenant can be performed only by limiting the estate to the sons successively in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them, or by limiting the estate to sons and daughters alike as tenants in common in tail, with cross remainders between them<sup>3</sup>. Prima facie 'children' or 'issue' in a marriage settlement means children or issue of that marriage, so that a power in it to charge may not be exercised in favour of children of a subsequent marriage<sup>4</sup>.

<sup>1</sup> See PARA 248 et seq ante.

<sup>2</sup> See *Pearse v Baron* (1821) Jac 158; *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543 at 577.

<sup>3</sup> *Grier v Grier* (1872) LR 5 HL 688 at 708. See also *Duke of Bedford v Marquess of Abercorn* (1836) 1 My & Cr 312; *Savage v Carroll* (1810) 1 Ball & B 265; *Re Whitcroft's Estate* [1934] IR 649, Ir CA (construction of marriage articles).

<sup>4</sup> *Dafforne v Goodman* (1699) 2 Vern 362; *Hart v Middlehurst* (1746) 3 Atk 371; and see *Re Woodleys (Minors)* (1892) 29 LR Ir 304, Ir CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(iv) Powers of Charging Portions/258. Charges authorised by the power.

### **258. Charges authorised by the power.**

A power of charging land with portions authorises a charge on any part of the land and a power of charging indefinitely may be exercised by a sale<sup>1</sup>. Further, a power to charge an estate with a gross sum implies a power to charge it with interest<sup>2</sup> but probably not at more than 4 per cent<sup>3</sup>. Referential trusts and powers are prima facie not to be read as multiplying charges<sup>4</sup>; but this does not apply where the estate on which the incumbrance is charged is increased proportionately<sup>5</sup>. A power of charging given to one person by reference to a power conferred on another person is free from all contingencies which are personal to that other person<sup>6</sup>. Further, under a power to charge a sum varying with the number of children, the full sum can be appointed even after the death of some of the children<sup>7</sup>. However, if the language is ambiguous, the power should not be read so as to authorise the vesting of portions before they are wanted<sup>8</sup>.

1 *Long v Long* (1800) 5 Ves 445. As to the method of raising portions generally see SETTLEMENTS vol 42 (Reissue) PARA 737.

2 *Lord Kilmarry v Geery* (1713) 2 Salk 538; *Trafford v Ashton* (1718) 1 P Wms 415 at 419; *Boycot v Cotton* (1738) 1 Atk 552; *Hall v Carter* (1742) 2 Atk 354; *Lewis v Freke* (1794) 2 Ves 507; *Roe v Pogson* (1816) 2 Madd 457; *Simpson v O'Sullivan* (1843) 3 Dr & War 446; *Balfour v Cooper* (1883) 23 ChD 472, CA; *Re Drax, Savile v Drax* [1903] 1 Ch 781, CA; *Re MacDermott's Estate* [1912] 1 IR 166, Ir CA. Contrast *Re Ussher's Estate* [1918] 1 IR 259 (arrears of annuity); and see MORTGAGE vol 77 (2010) PARAS 215-220.

3 See *Balfour v Cooper* (1883) 23 ChD 472, CA. As to rates of interest generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1303 et seq. As to the modern practice of the courts see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1310; and see *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92. As to interest on portions see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 72; SETTLEMENTS vol 42 (Reissue) PARA 739.

4 *Hindle v Taylor* (1855) 5 De GM & G 577; *Baskett v Lodge* (1856) 23 Beav 138; *Trew v Perpetual Trustee Co* [1895] AC 264, PC, but see the case where there are two separate settlements: *Re Beaumont, Bradshaw v Packer* [1913] 1 Ch 325; *Re Campbell's Trusts, Public Trustee v Campbell* [1922] 1 Ch 551. See also PARA 225 note 1 ante.

5 *Cooper v Macdonald* (1873) LR 16 Eq 258; *Re Arnell, Re Edwards, Prickett v Prickett* [1924] 1 Ch 473 (power to appoint whole of the income); but see *Re Berners, Berners v Calvert* (1892) 41 WR 188.

6 *Earl of Harrington v Countess Dowager of Harrington* (1868) LR 3 HL 295. See also PARA 224 ante.

7 *Knapp v Knapp* (1871) LR 12 Eq 238.

8 *Henty v Wrey* (1882) 21 ChD 332 at 359, CA; and see *Simmons v Pitt* (1873) 8 Ch App 978.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/2. CREATION OF POWERS/(2) CREATION OF PARTICULAR POWERS/(v) Powers generally found/259. Usual express powers.

### **(v) Powers generally found**

#### **259. Usual express powers.**

In addition to the usual wide power to appoint all or part of the capital<sup>1</sup> or income<sup>2</sup> in such shares and on such terms<sup>3</sup> as the trustees, in their absolute discretion<sup>4</sup>, think fit, settlements generally contain certain particular powers. The particular powers are:

- 4 (1) power to accumulate income<sup>5</sup>;
- 5 (2) power to advance the whole of the interest of a contingent beneficiary<sup>6</sup>;
- 6 (3) power to resettle the funds, excluding some of the existing beneficiaries<sup>7</sup>;
- 7 (4) power to appropriate assets to beneficiaries without obtaining their prior consent<sup>8</sup>;
- 8 (5) power to purchase residential property for occupation by the beneficiaries<sup>9</sup>;
- 9 (6) power to make loans to beneficiaries<sup>10</sup>;
- 10 (7) power to effect insurance on the lives of the settlor and beneficiaries<sup>11</sup>; and
- 11 (8) extended powers of investment, including the:
  - 1 1. (a) power to acquire, retain and manage interests in businesses<sup>12</sup>;
  - 2 2. (b) power to place the trust assets in non-income-producing assets or in foreign investments<sup>13</sup>;
  - 3 3. (c) power to release any of the trustees' powers of appointment<sup>14</sup>;
  - 4 4. (d) power to export the trust or appoint foreign trustees<sup>15</sup>; and
  - 5 5. (e) power to appoint nominees to hold and manage the trust assets<sup>16</sup>.

1 As to the liability to inheritance tax resulting from an appointment of capital see INHERITANCE TAXATION vol 24 (Reissue) PARAS 486, 499; and as to the liability to capital gains tax see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 122.

2 As to the liability to income tax resulting from appointments of income see INCOME TAXATION vol 23(2) (Reissue) PARAS 1550 et seq (for the position where the settlor is a possible object).

3 As to the exercise of power of appointment to create sub-trusts see PARA 273 post.

4 As to control of the powers see PARA 286 post.

5 As to the treatment of accumulated income for income tax purposes see INCOME TAXATION vol 23(2) (Reissue) PARAS 1552, 1566. As to the permitted duration of accumulations see the Law of Property Act 1925 s 164; the Perpetuities and Accumulations Act 1964 ss 13, 14; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1119 et seq.

6 As to advancement generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 73 et seq.

7 See *Muir v IRC* [1966] 3 All ER 38, [1966] 1 WLR 1269, CA; *Blausten v IRC* [1972] Ch 256, [1972] 1 All ER 41, CA.

8 See the Administration of Estates Act 1925 s 41(1) (as amended); and EXECUTORS AND ADMINISTRATORS.

9 This power is designed to counteract the effect of the decision in *Re Power's Will Trusts, Public Trustee v Hastings* [1947] Ch 572, [1947] 2 All ER 282. See the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and TRUSTS vol 48 (2007 Reissue) PARA 1035.

10 As to the duty to invest see TRUSTS vol 48 (2007 Reissue) PARAS 968, 1010.

11 Policies are generally effected to provide liquid funds to meet possible inheritance tax liabilities on the death of either the settlor or of certain beneficiaries, but sums received under the policy may themselves be liable to tax.

12 As to trustees' powers of investment see generally the Trustee Investments Act 1961; and TRUSTS vol 48 (2007 Reissue) PARA 1005 et seq.

13 See TRUSTS vol 48 (2007 Reissue) PARA 1007.

14 See PARA 365 et seq post. As to the possible liability to income tax resulting from a settlor's power of revocation see INCOME TAXATION vol 23(2) (Reissue) PARA 1548 et seq.

15 This power is designed to avoid the difficulties encountered in an application to approve a variation of the trust in order to permit the appointment of foreign trustees: see eg *Re Weston's Settlements*, *Weston v Weston* [1969] 1 Ch 223, [1968] 3 All ER 338, CA; and TRUSTS vol 48 (2007 Reissue) PARAS 863, 1062.

16 Investments should normally be in the names of the trustees: see TRUSTS vol 48 (2007 Reissue) PARA 968. As to delegation see TRUSTS vol 48 (2007 Reissue) PARA 984 et seq. See also PARA 291 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(i) Capacity/260. Personal capacity.

### **3. EXERCISE OF POWERS**

#### **(1) EXERCISE OF POWERS IN GENERAL**

##### **(i) Capacity**

##### **260. Personal capacity.**

Every person capable of disposing of property vested in him may exercise a power over that species of property, whether real or personal<sup>1</sup>. Married women now have the same powers of disposition as other persons sui juris<sup>2</sup>. Children can exercise a collateral power<sup>3</sup> in relation to real estate. They can exercise both a collateral power and a power in gross<sup>4</sup> in relation to personal estate, and have a limited capacity to exercise a power appendant<sup>5</sup>. The powers vested in a patient<sup>6</sup> who is incapable of administering and managing his own property can be exercised on the authority of the judge<sup>7</sup>.

1 Sugden on Powers (8th Edn) 153.

2 See generally MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 See PARA 203 ante.

4 See PARA 203 ante.

5 See PARA 203 ante; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 52.

6 See MENTAL HEALTH vol 30(2) (Reissue) PARA 681.

7 See the Mental Health Act 1983 ss 93, 94 (both as amended), 96(1)(k); and MENTAL HEALTH vol 30(2) (Reissue) PARA 681 et seq. As to the persons to be notified of an application see *Re B (Court of Protection; Notice of Proceedings)* [1987] 2 All ER 475, [1987] 1 WLR 552.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(i) Capacity/261. Powers of office holders.

##### **261. Powers of office holders.**

When a power is annexed to an office, all persons who fill the office may exercise the power; but, if the power is given to persons named with their office (for example 'to my executors' A and B<sup>1</sup>), it is a question of intention in each case whether the power is given to the persons or annexed to the office<sup>2</sup>, or is divisible between the persons originally named and their successors<sup>3</sup>. However, if the power arises by implication, it attaches to the office and may be

exercised by the holder for the time being<sup>4</sup>. A fiduciary power under an occupational scheme given to an employer will not pass either to the liquidator or the receiver. It may nevertheless be exercised by the court<sup>5</sup>.

1 See, however, *Paterson's Trustees v Finlay* 1918 SC 713.

2 *Houell v Barnes* (1634) Cro Car 382; *Eaton v Smith* (1839) 2 Beav 236; *Brassey v Chalmers, Seacombe v Holme* (1853) 4 De GM & G 528; *Byam v Byam* (1854) 19 Beav 58; *Bartley v Bartley* (1855) 3 Drew 384; *Re Cookes' Contract* (1877) 4 ChD 454; *Devitt v Kearney* (1883) 13 LR Ir 45, Ir CA; *Delany v Delany* (1885) 15 LR Ir 55; *Re Mellor, ex p Butcher* (1880) 13 ChD 465, CA; *Crawford v Forshaw* [1891] 2 Ch 261, CA; *Re Smith, Eastick v Smith* [1904] 1 Ch 139; *Re Robinson, Sproule v Sproule* [1912] 1 IR 410; *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622; *Kennedy v Kennedy* [1914] AC 215, PC; *Re Hampton, Public Trustee v Hampton* (1918) 88 LJ Ch 103; *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668. See, however, *Re Booth, Hattersley v Cowgill* (1917) 86 LJ Ch 270, where the power was held exercisable only by the original trustees. See also *White v M'Dermott* (1872) IR 7 CL 1; *Re Bacon, Toovey v Turner* [1907] 1 Ch 475; but see to the contrary *Danne v Annas and Johnson* (1561) 2 Dyer 219a; *Lock v Loggin* (1586) 1 And 145; *Anon* (1560) 2 Dyer 177a; *Robson v Flight* (1865) 4 De GJ & Sm 608 at 613.

3 *Attenborough v Attenborough* (1855) 1 K & J 296; *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622 at 631; distinguished in *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668; and see EXECUTORS AND ADMINISTRATORS.

4 *Anon* (1574) 2 Leon 220 (case 276); *Anon* (1580) 3 Dyer 371b. See also *Milward v Moore* (1580) Sav 72; *Forbes v Peacock* (1843) 11 M & W 630; *Sabin v Heape* (1859) 27 Beav 553; *Re Marshal Beresford's Trust Fund, Lord Aldenham v Archbishop of Armagh* (1917) 33 TLR 208. As to the survivorship of powers see PARA 262 post; and as to the disclaimer of powers see PARA 375 post.

5 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(i) Capacity/262. Survivorship of powers.

## 262. Survivorship of powers.

If a bare power not annexed to an estate or office is given to two or more donees, it cannot be exercised by the survivor or survivors, for the property must devolve in accordance with the terms of the settlement except in so far as there has been exact compliance with the provisions of any power<sup>1</sup>. Other powers are in general exercisable by the surviving donees<sup>2</sup>. Thus fiduciary powers are exercisable by the survivor, for a trust will not be allowed to fail for want of a trustee<sup>3</sup>. Again, if a power is given to trustees in whom an estate is vested, it may be exercised by the survivor<sup>4</sup> unless the settlor has shown a contrary intention<sup>5</sup>. Further, by statute any power or trust given to two or more trustees jointly may be exercised or performed by the survivor or survivors<sup>6</sup>, whether the trust or power was created before 1926 or after 1925<sup>7</sup>, but the rule is subject to any contrary intention expressed in the instrument creating the trust or power<sup>8</sup>. Such an intention is not shown merely by the vesting of a wide personal discretion in the trustees<sup>9</sup>. Further, subject to these provisions<sup>10</sup>, until the appointment of new trustees, the personal representatives or representative<sup>11</sup> for the time being of a sole trustee or of the last surviving or continuing trustee may exercise or perform any power or trust which was given to or capable of being exercised by the trustees or trustee for the time being of the trust<sup>12</sup>. Apart from statute, personal representatives or others can execute a trust or power only if they have in some way been pointed out by the instrument creating it as the proper persons to execute it<sup>13</sup>.

1 See PARA 263 text and notes 10-13 post. See also *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223, [1964] 3 All ER 82.



2 See *Re Bacon, Toovey v Turner* [1907] 1 Ch 475 at 478-479; *Bersel Manufacturing Co Ltd v Berry* [1968] 2 All ER 552, HL (powers of permanent life directors).

3 See TRUSTS vol 48 (2007 Reissue) PARA 807; and see *Metttoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587.

4 *Re Bacon, Toovey v Turner* [1907] 1 Ch 475. See also Co Litt 181b; *Gwilliams v Rowel* (1661) Hard 204; *Eyre v Countess of Shaftsbury* (1725) 2 P Wms 103 at 121; *Hudson v Hudson* (1735) Cas temp Talb 127 at 129; *A-G v Gleg* (1738) Amb 584 at 585; *Flanders v Clark* (1747) 1 Ves Sen 9; *Livesey v Harding*, *Livesey v Beckett* (1830) Taml 460; *Warburton v Sandys* (1845) 14 Sim 622; *Lane v Debenham* (1853) 11 Hare 188; *Re Cookes' Contract* (1877) 4 ChD 454.

5 *Re Bacon, Toovey v Turner* [1907] 1 Ch 475. See also Co Litt 113a, Hargrave's note (2), 181b; *Mansell v Mansell* (1757) Wilm 36 at 50; *Lancashire v Lancashire* (1848) 2 Ph 657 at 664.

6 Trustee Act 1925 s 18(1). See also TRUSTS vol 48 (2007 Reissue) PARA 983. As to the survivorship of powers on disclaimer see PARA 375 post.

7 See *ibid* s 69(1).

8 See *ibid* s 69(2).

9 *Crawford v Forshaw* [1891] 2 Ch 261 at 268, CA; *Re Smith, Eastick v Smith* [1904] 1 Ch 139 at 144; *Re Bacon, Toovey v Turner* [1907] 1 Ch 475 at 479.

10 See the text to note 6 *supra*.

11 'Personal representative' does not include an executor who has renounced or has not proved: Trustee Act 1925 s 18(4).

12 *Ibid* s 18(2). See also *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583; and TRUSTS vol 48 (2007 Reissue) PARA 981.

13 *Re Crunden and Meux's Contract* [1909] 1 Ch 690. See also *Cooke v Crawford* (1842) 13 Sim 91; *Mortimer v Ireland* (1847) 11 Jur 721; *Re Morton and Hallett* (1880) 15 ChD 143, CA; *Re Rumney and Smith* [1897] 2 Ch 351, CA; *Re Pixton and Tong's Contract* [1897] WN 178; *Re Waidanis, Rivers v Waidanis* [1908] 1 Ch 123, CA, which held that *Hall v May* (1857) 3 K & J 585 overruled *Ockleston v Heap* (1847) 1 De G & Sm 640.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(i) Capacity/263. Execution of bare powers.

## 263. Execution of bare powers.

A bare power is a power which is not fiduciary<sup>1</sup>. It is strictly construed and can be exercised only by the persons designated, either expressly or by reference, as donees of the power; and, in the case of a power annexed to a trust estate, the persons may be those to whom the estate may from time to time come<sup>2</sup>. A power given to three or more generally and not by name, as to 'my sons', survives so long as the plural number remains<sup>3</sup>; and a power given to A and B and their heirs is exercisable after A's death by A's heir and B<sup>4</sup>. Again, a power given to C and his assigns is exercisable by C's grantee, devisee, heir or executor<sup>5</sup>; and a power of sale given to D and his executors and administrators is exercisable by an administrator during minority<sup>6</sup>, the only limit to his authority being the duration of the minority<sup>7</sup>. However, a discretionary power to carry on a business, given to an executor who renounces, may not be exercised by an administrator<sup>8</sup>. Further, in the absence of a contrary intention<sup>9</sup>, a bare power not annexed to an estate or office still, it seems<sup>10</sup>, may not be exercised by the survivor of the donees<sup>11</sup>. This rule applies to a power to consent<sup>12</sup> and to a power of revocation<sup>13</sup>.

1 See PARA 208 ante.

2 *Cole v Wade* (1807) 16 Ves 27 (on appeal sub nom *Walter v Maunde* (1815) 19 Ves 424); *Townsend v Wilson* (1818) 1 B & Ald 608; *Hall v Dewes* (1821) Jac 189; *Lane v Debenham* (1853) 11 Hare 188; *Re Ingleby and Boak and Norwich Union Insurance Co* (1883) 13 LR Ir 326; *Re Bacon, Toovey v Turner* [1907] 1 Ch 475; *Re Symm's Will Trusts, Public Trustee v Shaw* [1936] 3 All ER 236. See also *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280; *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA; *Osborne to Rowlett* (1880) 13 ChD 774. See also the cases cited in PARA 262 note 13 ante.

3 *Lee v Vincent* (1584) Cro Eliz 26; *Jefferys v Marshall* (1870) 19 WR 94; but see to the contrary *Sykes v Sheard* (1863) 2 De GJ & Sm 6.

4 *Mansell v Mansell* (1757) Wilm 36 at 57; *Townsend v Wilson* (1818) 1 B & Ald 608; *Hall v Dewes* (1821) Jac 189.

5 *How v Whitfield* (1679) 1 Vent 339; *Saloway v Strawbridge* (1855) 1 K & J 371 (affd 7 De GM & G 594); *Hind v Poole* (1855) 1 K & J 383.

6 *Monsell v Armstrong* (1872) LR 14 Eq 423; *Re Thompson and M'Williams' Contract* [1896] 1 IR 356, Ir CA. But see *Re Robinson and Sords* (1879) 3 LR Ir 429.

7 *Re Cope, Cope v Cope* (1880) 16 ChD 49; and see EXECUTORS AND ADMINISTRATORS.

8 *Lambert v Rendle* (1863) 3 New Rep 247.

9 *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223, [1964] 3 All ER 82.

10 *Re Harding, Harding v Paterson* [1923] 1 Ch 182.

11 *Mansell v Mansell* (1757) Wilm 36 at 51; *Townsend v Wilson* (1818) 1 B & Ald 608; *Lane v Debenham* (1853) 11 Hare 188 at 192; *Paterson's Trustees v Finlay* 1918 SC 713 (power divorced from trust). See also *Re Bacon, Toovey v Turner* [1907] 1 Ch 475 at 478; *Re Harding, Harding v Paterson* [1923] 1 Ch 182.

12 *Atwaters v Birt* (1601) Cro Eliz 856.

13 *Montefiore v Browne* (1858) 7 HL Cas 241.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(ii) Formalities/264. In general.

## (ii) Formalities

### 264. In general.

Subject to certain statutory relaxations as to formalities<sup>1</sup>, every circumstance required by an instrument creating a power to accompany its execution must be strictly observed<sup>2</sup>. Provided that the rules of law and equity are not transgressed, the donor of a power may surround its execution with as many solemnities and direct it to be carried out by such instruments<sup>3</sup>, at such times, and with the consent of, or by, such persons as he pleases. However, if the instrument containing the terms of the power<sup>4</sup>, or the instrument of appointment itself<sup>5</sup> is lost, it may be presumed that the appointment was duly executed.

1 See PARAS 292-293, 297 post.

2 *Rutland v Doe d Wythe* (1843) 10 Cl & Fin 419, HL; *Frazer v Riversdale* [1913] 1 IR 539 (where requirements were not observed); and see PARAS 267-268 post.

3 *Cocker v Quayle* (1830) 1 Russ & M 535 (power to loan on security of bond).

4 *Hougham v Sandys* (1827) 2 Sim 95; *Skipwith v Shirley* (1805) 11 Ves 64.

5 *Re Airey, Airey v Stapleton* [1897] 1 Ch 164.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(ii) Formalities/265. Necessity for writing.

## 265. Necessity for writing.

If the property subject to the power is real estate or chattels real, any trusts affecting it must be manifested and proved by some writing signed by some person who is able to declare such trust, or by his will<sup>1</sup>. No writing is required, however, for pure personalty unless the power requires it<sup>2</sup>, for trusts of pure personalty may be declared orally, and the execution of the power is merely the declaration of the trust<sup>3</sup>.

1 Law of Property Act 1925 s 53(1)(b). See also *Hawke v Hawke* (1877) 26 WR 93. Contrast *Dye v Dye* (1884) 13 QBD 147, CA. Further, see *Duke of Marlborough v Lord Godolphin* (1750) 2 Ves Sen 61 at 76, 79; *Jones v Clough* (1751) 2 Ves Sen 365; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24.

2 *Proby v Landor* (1860) 28 Beav 504; *Bailey v Hughes* (1865) 19 Beav 169; *Duff v Dalzell* (1782) 1 Bro CC 147.

3 See TRUSTS vol 48 (2007 Reissue) PARA 644; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(ii) Formalities/266. Consent to exercise of powers.

## 266. Consent to exercise of powers.

Any required consent must be given, and all required formalities must be perfected, during the lifetime of the donee of the power<sup>1</sup>, and at or before the execution of the power<sup>2</sup>. If a power is given to be executed with the consent of one or more persons, and that one or any one of those persons dies, then unless a contrary intention appears<sup>3</sup> the power is gone<sup>4</sup>. But the consent of a person under disability may be dispensed with<sup>5</sup> unless the instrument shows that consent is required even during minority<sup>6</sup>.

1 *Hawkins v Kemp* (1803) 3 East 410; *Offen v Harman* (1859) 1 De GF & J 253. As to consents required by trustees of land to the exercise of their power of sale see the Trusts of Land and Appointment of Trustees Act 1996 s 10. For the effect upon protective trusts of consents to advancements under statutory or express powers see SETTLEMENTS vol 42 (Reissue) PARA 922.

2 *Bateman v Davis* (1818) 3 Madd 98; *Wiles v Gresham* (1854) 2 Drew 258 at 267.

3 See, however, *Green v Green* (1845) 2 Jo & Lat 529.

4 *Hutton v Simpson* (1716) 2 Vern 722; *Atwaters v Birt* (1601) Cro Eliz 856; *Danne v Annas and Johnson* (1561) 2 Dyer 219a; *Franklin's Case* (undated) cited in Moore KB at 62 and in *Hewett v Hewett* (1765) 2 Eden 332 at 333.

5 *Re T--* (1880) 15 ChD 78 (lunatic); *Re Neave and Chapman and Wren* (1880) 49 LJ Ch 642, 28 WR 976 (minor).

6 *Re Cardross's Settlement* (1878) 7 ChD 728; *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257. See generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 46, 52.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(ii) Formalities/267. Exercise by instrument specified.

## **267. Exercise by instrument specified.**

A power can be validly executed only by the instrument or instruments specified by the author of the power<sup>1</sup>. Thus a power required to be executed by deed cannot be validly exercised by will<sup>2</sup>, and a power to be executed by will cannot be validly exercised by any instrument to take effect in the donee's lifetime<sup>3</sup>. If on the true construction of the instrument only writing is required, a will suffices even if a deed appears to have been contemplated<sup>4</sup>. An instrument in the form of a deed is not, however, necessarily incapable of exercising a power exercisable only by will; if, although in form a deed, it is really testamentary, it validly exercises a power which is to be exercised by will<sup>5</sup>. But the mere fact that the limitations cannot take effect until after the appointor's death does not make the instrument testamentary<sup>6</sup>; even less does the mere reservation of a power of revocation have that effect<sup>7</sup>.

1 *MacAdam v Logan* (1791) 3 Bro CC 310; *Dormer v Thurland* (1728) 2 P Wms 506; *Ross v Ewer* (1744) 3 Atk 156; *Sanders v Franks* (1817) 2 Madd 147; *Re Weightman's Settlement, Astle v Wainwright* [1915] 2 Ch 205 (as to the purported new appointment).

2 *Earl of Darlington v Pulteney* (1775) 1 Cowp 260; *Countess Dowager of Cavan v Doe d Pulteney* (1795) 6 Bro Parl Cas 175, HL; *Re Phillips, Robinson v Burke* (1889) 41 ChD 417 at 419; *Bushell v Bushell* (1803) 1 Sch & Lef 96. As to the characteristics of a deed see Co Litt 171b; Shep Touch (8th Edn) 50; and DEEDS AND OTHER INSTRUMENTS.

3 *Reid v Shergold* (1805) 10 Ves 370; *Re Evered, Molineux v Evered* [1910] 2 Ch 147, CA.

4 Sugden on Powers (8th Edn) 214; *Dowager Countess of Roscommon v Fowke* (1745) 6 Bro Parl Cas 158, HL; *Edwards v Edwards* (1818) 3 Madd 197 (on appeal (1821) Jac 335).

5 *Marjoribanks v Hovenden* (1843) Drury temp Sug 11. Contrast *Fortescue v Hennah* (1812) 19 Ves 67; and see WILLS vol 50 (2005 Reissue) PARA 303.

6 *Hougham v Sandys* (1827) 2 Sim 95 at 148; and see *Baird v Baird* [1990] 2 AC 548, [1990] 2 All ER 300, PC.

7 *Tompson v Browne* (1835) 3 My & K 32; *Re Weightman's Settlement, Astle v Wainwright* [1915] 2 Ch 205 at 210. See also *Re Waddington, Bacon v Bacon* [1897] WN 7.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(ii) Formalities/268. Particular instruments.

## **268. Particular instruments.**

A power 'to appoint by deed or otherwise' or 'by will or otherwise' includes all methods by which the property subject to the power can legally pass. Further, a power to be executed 'by an instrument in writing' may be executed by a will, for a will is an instrument in writing<sup>1</sup>. However, any added requirements must be satisfied, for although the statutory requirement of due execution as a will applies to such a document, the statutory dispensation with added solemnities<sup>2</sup> does not<sup>3</sup>; and a will exercising a power of this description is revocable even if no express power of revocation is reserved<sup>4</sup>.

A power exercisable 'by deed, instrument or will' may be validly exercised in a number of ways. One way is a written order to the trustees of the fund; another is a letter from the donee of the power, including a reference to the power or the property and accompanying a gift of money

which the letter states to be in pursuance of the power or out of the property<sup>5</sup>. Again, when the donee of the power is himself sole trustee of the fund such a power may be exercised by means of a cheque on the bank where the fund is lying, provided that the donee has no money of his own there<sup>6</sup>. Further, a power exercisable 'by any writing in the nature of or purporting to be a will or codicil' may be exercised by a document purporting to be a will but not capable of being admitted to probate<sup>7</sup>.

1 *West v Ray* (1854) Kay 385; *Orange v Pickford* (1858) 4 Drew 363; *Smith v Adkins* (1872) LR 14 Eq 402. See also *Longford v Eyre* (1721) 1 P Wms 740. As to the exercise, by writing in the nature of a will, of a power exercisable 'in writing' see PARA 297 post.

2 See the Wills Act 1837 s 10; and PARA 297 post.

3 *Taylor v Meads* (1865) 4 De GJ & Sm 597. *Buckell v Blenkhorn* (1846) 5 Hare 131 is overruled on this point: see *Taylor v Meads* supra at 603. See also *Collard v Sampson* (1853) 4 De GM & G 224; *West v Ray* (1854) Kay 385.

4 *Lisle v Lisle* (1781) 1 Bro CC 533.

5 *Brodrick v Brown* (1855) 1 K & J 328

6 *Brodrick v Brown* (1855) 1 K & J 328.

7 *Re Broad, Smith v Draeger* [1901] 2 Ch 86; but see *Re Barnett, Dawes v Ixer* [1908] 1 Ch 402; and contrast para 298 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(ii) Formalities/269. Persons to give a discharge for the appointed fund.

## **269. Persons to give a discharge for the appointed fund.**

Where the donee of a general power over<sup>1</sup> personalty executes the power and appoints an executor, the executor is the proper person to receive the fund. He may give a good receipt for the fund, although it does not actually pass to him<sup>2</sup>. The same rule applies to an administrator with the will annexed<sup>3</sup>. However, if the power is limited it is a question of construction whether it authorises a direction to transfer the fund. Where the fund stands in the name of trustees, an appointment to other trustees in trust for objects does not, of itself, authorise the transfer of the fund from the original trustees, who are the proper persons to distribute it<sup>4</sup>.

1 The 'donee of the power' includes a married woman: see PARA 260 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

2 *Re Philbrick's Settlement* (1865) 11 Jur NS 558; *Hayes v Oatley* (1872) LR 14 Eq 1; *Re Hoskin's Trusts* (1877) 6 ChD 281, CA; *O'Grady v Wilmot* [1916] 2 AC 231 at 249-251, 271-272, HL (considering earlier cases cited in this note); and see *Beyfus v Lawley* [1903] AC 411, HL; *Re Guedalla, Lee v Guedalla's Trustee* [1905] 2 Ch 331; *Re Fenston's Settlement, Max-Muller v Simonsen* [1971] 3 All ER 1092 at 1098, [1971] 1 WLR 1640 at 1647; and EXECUTORS AND ADMINISTRATORS.

3 *Re Peacock's Settlement, Kelcey v Harrison* [1902] 1 Ch 552.

4 *Busk v Aldam* (1874) LR 19 Eq 16; *Von Brockdorff v Malcolm* (1885) 30 ChD 172; *Re Tyssen, Knight-Bruce v Butterworth* [1894] 1 Ch 56; *Re Mackenzie, Bain v Mackenzie* [1916] 1 Ch 125; *Re Mackenzie, Thornton v Huddleston* [1917] 2 Ch 58 (transfer refused); but see *Scotney v Lomer* (1885) 29 Ch 535 (on appeal (1886) 31 ChD 380, CA).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/270. No technical words required.

### (iii) Construction

#### 270. No technical words required.

No technical words or recital of the power are necessary for the execution of a power<sup>1</sup>; all that is required is that an intention to exercise it should be clear<sup>2</sup>. Thus powers have been held to be well exercised by informal statements in a bill<sup>3</sup>; petition<sup>4</sup>; answer<sup>5</sup>; appointment of, ostensibly, only part of the fund<sup>6</sup>; appointment of a new trustee<sup>7</sup>; settlement<sup>8</sup>; conveyance by lease and release<sup>9</sup>; bond<sup>10</sup>; transfer<sup>11</sup>; gift inter vivos<sup>12</sup>; recital<sup>13</sup>; enumeration of parties to be benefited<sup>14</sup>; memorandum<sup>15</sup>; letter<sup>16</sup>; declaration<sup>17</sup>; and statement of facts<sup>18</sup>.

However, a power will not be exercised if a limited owner with a power of appointment in his own favour merely deals with the property as though he were the owner, unless those acts are such as are prescribed by the power for vesting the property<sup>19</sup>. Thus a tenant for life who renews a lease<sup>20</sup> or changes the investments<sup>21</sup> or signs a receipt for a payment on account of unascertained compensation payable on a compulsory acquisition of part of the property subject to the power<sup>22</sup> will not be taken to have exercised a power in his own favour. Nor is it enough for a donee, in ignorance of the power, to execute for other purposes a deed which recites that the property is vested in another<sup>23</sup>. Further, the execution of a power of attorney to sell stock is insufficient, for a power of attorney is not an instrument of alienation, but a mere instrument of substitution and authority which does not provide the required direction to alienate or the instrument of alienation<sup>24</sup>.

1 As to the exercise of special powers by will see PARA 318 et seq post. Many of the cases cited there can be applied to execution inter vivos.

2 *Maundrell v Maundrell* (1805) 10 Ves 246 at 257; *Clere's Case* (1600) 6 Co Rep 17b; *Scrope's Case* (1612) 10 Co Rep 143b at 144a; *Blake v Marnell* (1811) 2 Ball & B 35 at 44; *Carver v Richards* (1859) 27 Beav 488 (affd (1860) 1 De GF & J 548); *Smith v Adkins* (1872) LR 14 Eq 402; *Maddison v Andrew* (1747) 1 Ves Sen 57 at 61; *Webb v Honnor* (1820) 1 Jac & W 352 at 357; *Cuninghame v Anstruther* (1872) LR 2 Sc & Div 223 at 233; *Re Edmonstone, Bevan v Edmonstone* (1901) 49 WR 555. For the general rules for the interpretation of deeds and other nontestamentary instruments see DEEDS AND OTHER INSTRUMENTS.

3 *Allen v Papworth* (1731) 1 Ves Sen 163; *Irwin v Farrer* (1812) 19 Ves 86.

4 *Fortescue v Gregor* (1800) 5 Ves 553; *Holloway v Clarkson* (1843) 2 Hare 521; *Re Davids' Trusts* (1859) John 495 at 500; *Cambridge v Rous (No 2)* (1858) 25 Beav 574.

5 *Carter v Carter* (1730) Mos 365.

6 *Foster v Cautley* (1855) 6 De GM & G 55, where there was an appointment of one-third of the fund to one of three children, and the terms of the appointment raised a necessary implication of appointment of the other two-thirds to the other two children.

7 *Re Bennett's Settlement Trusts* (1867) 16 WR 331.

8 *Cuninghame v Anstruther* (1872) LR 2 Sc & Div 223; *Wilson v Piggott* (1794) 2 Ves 351; *Poulson v Wellington* (1729) 2 P Wms 533; *Irwin v Irwin* (1859) 10 I Ch R 29.

9 *Tomlinson v Dighton* (1711) 1 P Wms 149.

10 *Burke v Lambert* (1867) 15 WR 913.

11 *Marler v Tommas* (1873) LR 17 Eq 8. See also *Watson v Marshall* (1918) 145 LT Jo 129 (registration of shares in name of donee who was also sole executrix).

- 12 *Farington v Parker* (1867) LR 4 Eq 116.
- 13 *Lee v Head* (1855) 1 K & J 620; *Re Farnell's Settled Estates* (1886) 33 ChD 599; and see note 14 infra.
- 14 *Bailey v Hughes* (1854) 19 Beav 169. See also *Re Sugden's Trusts*, *Sugden v Walker* [1917] 2 Ch 92, CA (recital operating as partial release).
- 15 *Proby v Landor* (1860) 28 Beav 504.
- 16 *Re Jennings* (1857) 8 I Ch R 421, PC.
- 17 *Re Shuker's Estate*, *Bromley v Reed* [1937] 3 All ER 25.
- 18 *Eaton v Smith* (1839) 2 Beav 236.
- 19 *Brookman v Hales* (1813) 2 Ves & B 45 at 50.
- 20 *Brookman v Hales* (1813) 2 Ves & B 45.
- 21 *Reith v Seymour* (1828) 4 Russ 263.
- 22 *Morgan v Milman* (1853) 3 De GM & G 24.
- 23 *Griffith-Boscawen v Scott* (1884) 26 ChD 358; *Minchin v Minchin* (1871) 5 IR Eq 258 at 267, Ir CA; *Re Horsfall*, *Hudleston v Crofton* [1911] 2 Ch 63. See also *Re Sugden's Trusts*, *Sugden v Walker* [1917] 2 Ch 92, CA.
- 24 *Hughes v Wells* (1852) 9 Hare 749 at 764. See also *Marler v Tommas* (1873) LR 17 Eq 8.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/271. Substantial conformity sufficient.

## **271. Substantial conformity sufficient.**

An appointment which substantially accords with the expressed purpose of the power is not invalidated merely because it is not strictly in accordance with the power in manner and form. Thus a power to appoint upon trust 'for such person or persons' as the appointor thinks fit authorises an appointment 'for such purposes' as he thinks fit<sup>1</sup>. A power to appoint an absolute interest authorises the appointment of a lesser interest<sup>2</sup> or of an absolute interest subject to restrictions<sup>3</sup>. A power to charge to an unlimited amount authorises the appointment of a life interest<sup>4</sup>. A power to purchase an annuity<sup>5</sup> or an unlimited power to appoint dividends<sup>6</sup> authorises the appointment of the capital sum. And a power to appoint among children as the appointor pleases authorises the appointment of capital and income and the postponement of payment<sup>7</sup>. Again, a power to appoint estates to be purchased with money to arise from the sale of other estates may be exercised by appointing those other estates<sup>8</sup>; a power to appoint a mixed fund of realty and personalty authorises an appointment of realty and personalty separately<sup>9</sup>; and a power to appoint a legal estate could be executed in equity by appointing to trustees for the objects<sup>10</sup>, or on trust for sale and to hold the proceeds of sale for the objects<sup>11</sup>.

1 *Re Dilke*, *Re Dilke's Settlement Trusts*, *Verey v Dilke* [1921] 1 Ch 34, CA; *Re Harvey*, *Banister v Thirtle* [1950] 1 All ER 491; *Re Triffitt's Settlement*, *Hall v Hyde* [1958] Ch 852, [1958] 2 All ER 299.

2 *Bovey v Smith* (1692) 15 Lords Journals 275, HL; *Crozier v Crozier* (1843) 3 Dr & War 353.

3 *Re De La Bere's Marriage Settlement Trusts*, *De La Bere v Public Trustee* [1941] Ch 443, [1941] 2 All ER 533 (exclusion from after-acquired property clause).

4 *Long v Long* (1800) 5 Ves 445 (execution of rentcharge by creation of term of years); *Trollope v Linton* (1823) 1 Sim & St 477 at 485. See also *Roberts v Dixwell* (1738) Sugden on Powers (8th Edn) App 930; *Thwaytes v Dye* (1688) 2 Vern 80; *Ricketts v Loftus* (1841) 4 Y & C Ex 519; *Marnell v Blake* (1816) 4 Dow 248,

HL; *Muskerry v Chinnery* (1835) L & G temp Sugd 185 at 227 (on appeal sub nom *Sheehy v Lord Muskerry* (1839) 7 Cl & Fin 1, HL); *Dennett v Pass* (1834) 1 Bing NC 388.

5 *Messeena v Carr* (1870) LR 9 Eq 260.

6 *Phillips v Brydon* (1858) 26 Beav 77.

7 *Wilson v Wilson* (1855) 21 Beav 25. A power to appoint personalty in such proportion as the appointor directs allowed an appointment to an object for her separate use: *Alexander v Alexander* (1755) 2 Ves Sen 640; *Dickinson v Mort* (1850) 8 Hare 178; *Willis v Kymer* (1877) 7 ChD 181.

8 *Bullock v Fladgate* (1813) 1 Ves & B 471.

9 *Morgan d Surman v Surman* (1808) 1 Taunt 289.

10 *Thornton v Bright* (1836) 2 My & Cr 230; *Cowx v Foster* (1860) 1 John & H 30. See also *Re Loughhead*, *Hamilton v Loughhead* [1918] 1 IR 227; *Re Mackenzie*, *Bain v Mackenzie* [1916] 1 Ch 125 (personalty); *Hervey v Hervey* (1739) 1 Atk 561.

11 *Crozier v Crozier* (1843) 3 Dr & War 353 at 371; *Churchman v Harvey* (1757) Amb 335 at 339; *Kenworthy v Bate* (1802) 6 Ves 793; *Fowler v Cohn* (1856) 21 Beav 360; *Re Mackenzie*, *Thornton v Huddleston* [1917] 2 Ch 58 (personalty). See also *d'Abbadie v Bizoin* (1871) 5 IR Eq 205; *Re Swinburne*, *Swinburne v Pitt* (1884) 27 ChD 696; *Re Paget*, *Re Mellor*, *Mellor v Mellor* [1898] 1 Ch 290; *Re Redgate*, *Marsh v Redgate* [1903] 1 Ch 356; *Re Adams' Trustees' and Frost's Contract* [1907] 1 Ch 695; and the cases cited in PARA 269 note 4 ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/272. Ancillary powers and interests.

## 272. Ancillary powers and interests.

Powers and interests which are ancillary to the principal authorised powers and interests are given to donees. For example, a power to postpone sale and powers of management until sale may be given on an appointment to trustees for sale<sup>1</sup>. A wider administrative power of investment is another example<sup>2</sup>. Again, a power to an executor to raise money to pay debts authorises a sale for that purpose<sup>3</sup>; a power to charge a gross sum authorises the appointment of interest on it<sup>4</sup>; and a power to raise a fixed sum by mortgage authorises the raising of the costs of the mortgage<sup>5</sup>. Further, a power to appoint income not exceeding a stated sum out of residue authorises the appointment of that sum 'without any deduction', so that it did not bear estate duty<sup>6</sup>; although under a corresponding power to appoint capital, a similar appointment of capital would be excessive<sup>7</sup>. A power 'to appoint on such trusts as the donee pleases' authorises the declaration of a trust for sale and all necessary trusts<sup>8</sup>.

1 *Re Ainsworth*, *Re Yates*, *Yates v Wormald* [1921] 2 Ch 179; and see PARA 291 post. Notwithstanding any provision to the contrary, a power to postpone sale is implied in every trust for sale of land created by a disposition: see the Trusts of Land and Appointment of Trustees Act 1996 s 4(1).

2 *Re Rank's Settlement Trusts*, *Newton v Rollo* [1979] 1 WLR 1242.

3 *Wareham v Brown* (1690) 2 Vern 153; *Bateman v Bateman* (1739) 1 Atk 421. See also *Metcalfe v Hutchinson* (1875) 1 ChD 591.

4 *Roe v Pogson* (1816) 2 Madd 457.

5 *Armstrong v Armstrong* (1874) LR 18 Eq 541.

6 *Re Smith-Bosanquet*, *Smith v Smith-Bosanquet* [1940] Ch 954, [1940] 3 All ER 519; *Re Sebright*, *Public Trustee v Sebright* [1944] Ch 287, [1944] 2 All ER 547 (jointure rentcharge); *Re Lonsdale's Will Trusts*, *Lowther v Lowther* [1960] Ch 288, [1959] 3 All ER 679, CA. See also *Re Paulet's Will Trusts*, *Thompson v Winchester* [1969] 1 Ch 552, [1967] 1 All ER 854. Estate duty has been replaced by inheritance tax. For the incidence of the burden of tax on death see INHERITANCE TAXATION vol 24 (Reissue) PARA 651. It seems that there are no decided



cases on the effect of 'free of tax' clauses on the incidence of inheritance tax. However, it seems clear that such words do not authorise an appointment of the stated sum free of income tax. See also PARA 252 ante.

7 *Re Keele Estates (No 2), Aveling v Sneyd* [1952] Ch 603, [1952] 2 All ER 164, CA.

8 *Cowx v Foster* (1860) 1 John & H 30; but see *Cox v Cox* (1855) 1 K & J 251.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/273. Appointment in settlement.

### 273. Appointment in settlement.

A power to appoint among a class enables the appointor to settle the appointed shares, provided the appointment is confined to objects<sup>1</sup>. He may appoint to one object for life with remainder to the others<sup>2</sup> or with remainder as that object appoints by deed or will<sup>3</sup>, or by will alone, provided the object is in existence when the power is created so that the perpetuity rule will not be infringed<sup>4</sup>. An express power of appointment is not analogous to a power of advancement<sup>5</sup>, and does not permit the creation of discretionary trusts<sup>6</sup> unless they are expressly authorised. However, a special power does not enable the appointor to amend the trusts in default of appointment<sup>7</sup>, although a general power does<sup>8</sup>.

1 *Re Hughes, Hughes v Footner* [1921] 2 Ch 208. As to the use of the word 'object' see PARA 209 note 1 ante.

2 *Alloway v Alloway* (1843) 4 Dr & War 380 at 387; *Wilson v Wilson* (1855) 21 Beav 25; *Pringle's Trustees v Basta* 1913 SC 172; *Watt's Trustees v Jamieson* 1912 SC 1320 at 1323-1324; *Moubray's Trustees v Moubray* 1929 SC 254 (but consider the construction of the power). Contrast *Re Staples, Fitzherbert v Midland Bank Executor and Trustee Co Ltd* [1933] IR 126 (exclusive appointment compulsory).

3 *Bray v Bree* (1834) 2 Cl & Fin 453, HL; *Jebb v Tugwell* (1855) 7 De GM & G 663. Contrast *Mackenzie's Trustees v Mackenzie* 1927 SC 424; but see *Moubray's Trustees v Moubray* 1929 SC 254 at 263-264.

4 *Phipson v Turner* (1838) 9 Sim 227. Contrast *Wollaston v King* (1869) LR 8 Eq 165; and see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1102.

5 *Re Morris's Settlement Trusts, Adams v Napier* [1951] 2 All ER 528, CA.

6 *Re Morris's Settlement Trusts, Adams v Napier* [1951] 2 All ER 528, CA; *Re Hunter's Will Trusts, Gilks v Harris* [1963] Ch 372, [1962] 3 All ER 1050; and see *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

7 *Re William Falconer's Trusts, Re Ann Falconer's Trusts, Property and Estates Co Ltd v Frost* [1908] 1 Ch 410.

8 *Re McAuliffe and Balfour* (1884) 50 LT 353.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/274. Advancement, maintenance and jointure.

### 274. Advancement, maintenance and jointure.

A power of advancement<sup>1</sup> authorises any use of the money which will improve the material situation of the beneficiary<sup>2</sup> and includes provision for a child on marriage<sup>3</sup>, but not an advance to pay the debts of an object's husband<sup>4</sup>, and the creation of sub-trusts<sup>5</sup>. Any sums properly advanced are irrecoverable<sup>6</sup>. However, power for a married woman to direct maintenance does

not authorise an appointment to the husband for maintenance until the youngest child is of full age<sup>7</sup>, nor does a power in marriage articles for the spouses to alter the provisions as they think fit before the settlement is executed authorise the insertion of a power for the husband to provide for a second wife and children of a second marriage<sup>8</sup>. Again, a divorced husband is not an object of a power to appoint in favour of 'any husband who may survive' the appointor, for at the time of her death he is not her husband<sup>9</sup>; and the same applies to a divorced wife<sup>10</sup>. Similarly, under a power to appoint for some future period, a power of advancement may not be conferred which will be exercisable at any earlier time<sup>11</sup>.

1 As to the statutory power conferred by the Trustee Act 1925 s 32 (as amended) see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 73-80.

2 See *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL; *Re Clore's Settlement Trusts, Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955.

3 *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452; *Lloyd v Cocker* (1860) 27 Beav 645.

4 *Talbot v Marshfield* (1868) 3 Ch App 622; *Lowther v Bentinck* (1874) LR 19 Eq 166; *Re Aldridge, Abram v Aldridge* (1886) 55 LT 554, CA.

5 See *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL; *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.

6 *Lawrie v Bankes* (1858) 4 K & J 142; *Re Gosset's Settlement* (1854) 19 Beav 529 at 535; *Re Fox, Wodehouse v Fox* [1904] 1 Ch 480.

7 *Lloyd v Lloyd* (1858) 26 Beav 96; *Hammond v Neame* (1818) 1 Swan 35. See also *Chester v Chadwick* (1842) 13 Sim 102; *Re Main's Settlement* (1866) 15 WR 216; *Re Greenslade, Greenslade v McCowen* [1915] 1 Ch 155, considered in PARA 291 note 19 post.

8 *Duke of Bedford v Marquess of Abercorn* (1836) 1 My & Cr 312.

9 *Bosworthick v Clegg* [1929] WN 133; *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA. See also *Blount v Crozier* [1917] 1 IR 461 (second husband excluded).

10 *Re Slaughter, Trustees Corp'n Ltd v Slaughter* [1945] Ch 355, [1945] 2 All ER 214; *Re Allan, Allan v Midland Bank Executor and Trustee Co Ltd* [1954] Ch 295, [1954] 1 All ER 646, CA. See also PARAS 332, 387 post.

11 *Re Bainbridge, Darell v Bainbridge* [1948] Ch 717, [1948] 2 All ER 657.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/275. Cy-près doctrine.

## 275. Cy-près doctrine.

Where there is not even substantial conformity in an appointment, the court may nevertheless interpose in favour of the general intention and execute the particular intention cy-près<sup>1</sup>. This application of the cy-près doctrine<sup>2</sup>, which the courts will not extend further<sup>3</sup>, but which appears still to exist<sup>4</sup>, applies only to testamentary appointments of realty<sup>5</sup>, and not to appointments by deed<sup>6</sup> or appointments of personalty<sup>7</sup> or of blended realty and personalty<sup>8</sup>. Under the doctrine, the court has construed an appointment to an object for life with remainder in tail to his first and other sons who are not objects, as an estate tail in the appointee<sup>9</sup>, provided that to do so will neither omit any object intended to be included nor include any object intended to be omitted<sup>10</sup>. It is essential that the particular estate should be a freehold estate<sup>11</sup> and that the remainder should be in tail<sup>12</sup>, but on a class gift the cy-près doctrine may be applied to some members of the class only, and not to others<sup>13</sup>.

- 1 As to this application of the cy-près doctrine see WILLS vol 50 (2005 Reissue) PARA 521. As to the application of the doctrine in relation to charities see CHARITIES vol 8 (2010) PARA 208 et seq.
- 2 The doctrine is considered and explained in *Hampton v Holman* (1877) 5 ChD 183.
- 3 *Re Mortimer, Gray v Gray* [1905] 2 Ch 502, CA.
- 4 See the article by RE Megarry in 55 LQR 422.
- 5 *Stackpoole v Stackpoole* (1843) 4 Dr & War 320.
- 6 *Brudenell v Elwes* (1801) 1 East 442.
- 7 *Routledge v Dorril* (1794) 2 Ves 357.
- 8 *Boughton v James* (1844) 1 Coll 26 at 44.
- 9 *Pitt v Jackson* (1786) 2 Bro CC 51; *Stackpoole v Stackpoole* (1843) 4 Dr & War 320.
- 10 *Monypenny v Dering* (1852) 2 De GM & G 145; *Line v Hall* (1873) 43 LJ Ch 107; *Re Rising, Rising v Rising* [1904] 1 Ch 533; *Re Mortimer, Gray v Gray* [1905] 2 Ch 502, CA; but see *Pitt v Jackson* (1786) 2 Bro CC 51.
- 11 *Beard v Westcott* (1813) 5 Taunt 393.
- 12 *Bristow v Warde* (1794) 2 Ves 336; *Hale v Pew* (1858) 25 Beav 335; *Humberston v Humberston* (1716) 2 Vern 737. It is not clear to what extent the ability to create an entailed interest has survived: see the Law of Property Act 1925 s 130 (s 130(1)-(3), (6) repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), (4) Sch 4).
- 13 *Vanderplank v King* (1843) 3 Hare 1 at 14.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/276. Appointments to executors and administrators.

## **276. Appointments to executors and administrators.**

An appointment by deed by the donee of a general power to his own executors and administrators gives the absolute interest to the donee<sup>1</sup>. Similarly, an appointment by will to the appointor's executors and administrators, followed by directions which either fail or do not exhaust the fund, makes the appointed fund part of the appointor's assets; so that an appointment of a fund which is treated as blended with the appointor's own property raises the presumption that the appointor intended to make the fund his own for all purposes, whether that appointment is to executors as such<sup>2</sup> or to trustees who are not also executors<sup>3</sup>. The same rule applies to real and personal estate<sup>4</sup>, and applies to cases of disclaimer as well as to cases of lapse<sup>5</sup>.

- 1 *Mackenzie v Mackenzie* (1851) 3 Mac & G 559.
- 2 *Brickenden v Williams* (1869) LR 7 Eq 310; *Bristow v Skirrow* (1870) LR 10 Eq 1; *Chamberlain v Hutchinson* (1856) 22 Beav 444.
- 3 *Lefevre v Freeland* (1857) 24 Beav 403; *Re Pinède's Settlement* (1879) 12 ChD 667.
- 4 *Re Van Hagan, Sperling v Rochfort* (1880) 16 ChD 18, CA; *Re Horton, Horton v Perks, Horton v Clark* (1884) 51 LT 420.
- 5 *A-G v Brackenbury* (1863) 1 H & C 782. See also *A-G v Munby* (1858) 3 H & N 826. As to lapse see further PARA 301 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/277. Appointments among a class.

### **277. Appointments among a class.**

If a power of appointment among a class which is also entitled in default of appointment is no more than a power to limit the proportions in which the members of the class are to take, it may not be exercised if there is only one member of that class<sup>1</sup>. However, the power may be framed so as to enable the appointor to make the property pass by, and not in default of, appointment<sup>2</sup>; and such a power may be well exercised even if there is but one object and that object takes in default of appointment<sup>3</sup>. A limitation in default of appointment to the only object of a power cannot be defeated by an appointment to that object which fails in the event that happens. The estate in default can be defeated only by an appointment which takes effect, and only to the extent to which the appointment does take effect<sup>4</sup>.

1 *Campbell v Sandys* (1803) 1 Sch & Lef 281 at 293; *Folkes v Western* (1804) 9 Ves 456 at 461.

2 *Boyle v Bishop of Peterborough* (1791) 1 Ves 299 at 309 per Lord Thurlow.

3 *Bray v Bree* (1834) 2 Cl & Fin 453, HL; *Noel v Lord Walsingham* (1824) 2 Sim & St 99 at 112; *Woodcock v Renneck* (1841) 4 Beav 190 (affd (1842) 1 Ph 72); *Re Cotton, Wood v Cotton* (1888) 40 ChD 41.

4 *Roe d Buxton v Dunt* (1767) 2 Wils 336; *Doe d Brownsmith v Denny* (1756) 1 Keny 280.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/278. Exclusion of objects.

### **278. Exclusion of objects.**

In the absence of any contrary indication in the power, an appointment, whenever made, under a power to appoint property among two or more objects will be valid even if any object is altogether excluded, or an unsubstantial, illusory or nominal share only is appointed to one or more objects, or is left to devolve on them in default of appointment<sup>1</sup>. The trust instrument may authorise a resettlement for the principal purpose of excluding a specific beneficiary from the class of objects<sup>2</sup>.

1 Law of Property Act 1925 s 158 (replacing the Illusory Appointments Act 1830 ss 1, 2; and the Powers of Appointment Act 1874 (Lord Selborne's Act)). For the former law see Sugden on Powers (8th Edn) 938-942. As to the use of the word 'object' see PARA 209 note 1 ante.

2 *Muir v IRC* [1966] 3 All ER 38, [1966] 1 WLR 1269, CA; *Blausten v IRC* [1972] Ch 256, [1972] 1 All ER 41, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/279. Death of member of class before appointment.

### **279. Death of member of class before appointment.**

Where a person is empowered to divide a fund among the members of a particular class, the death of some members of that class before the exercise of the power does not prevent the donee of the power from exercising it in favour of the surviving members of the class, even if the deceased persons, had they been alive, must have had a share<sup>1</sup>. Similarly, even where the objects in default of appointment would take as individuals and as tenants in common, the death of an object after the testator's death although during the donee's lifetime and before any execution, leaves the power fully exercisable in favour of surviving objects<sup>2</sup>.

1 *Boyle v Bishop of Peterborough* (1791) 1 Ves 299; *Butcher v Butcher, Gooday v Butcher* (1812) 1 Ves & B 79 at 92; *Vane v Lord Dungannon* (1804) 2 Sch & Lef 118; *M'Ghie v M'Ghie* (1817) 2 Madd 368; *Houstoun v Houstoun* (1831) 4 Sim 611; *Ricketts v Loftus* (1841) 4 Y & C Ex 519 at 533; *Woodcock v Renneck* (1842) 1 Ph 72; *Paske v Haselfoot* (1863) 33 Beav 125 at 127 per Romilly MR.

2 *Re Ware, Cumberlege v Cumberlege-Ware* (1890) 45 ChD 269. As to the use of the word 'object' see PARA 209 note 1 ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/280. Death of member of class before creation of power.

## **280. Death of member of class before creation of power.**

Where a power is given by will to appoint among several objects<sup>1</sup> to whom the estate in default of appointment is given as individuals and as tenants in common, not as joint tenants, the death of any of the objects in the testator's lifetime pro tanto defeats the power and devise over, so that the power and devise over only remain as to the shares of the survivors<sup>2</sup>.

1 As to the use of the word 'object' see PARA 209 note 1 ante.

2 *Re Turner, Hudson v Turner* [1932] 1 Ch 31; Sugden on Powers (8th Edn) 419-422; *Reade v Reade* (1801) 5 Ves 744.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/281. Contingent appointments.

## **281. Contingent appointments.**

The donee of a limited power may appoint to one object on a contingency within the perpetuity period and to another if that contingency does not occur<sup>1</sup> unless, exceptionally, the donee is restricted by the terms of the power to appointing only to one object to the exclusion of others<sup>2</sup>. Similarly, appointments to a contingent class or to take effect in the future within the perpetuity period are good<sup>3</sup>. The appointment of a share of a fund to an object upon the happening of a certain event carries with it all intermediate income and accretions<sup>4</sup> not otherwise disposed of<sup>5</sup>.

1 *Caulfield v Maguire* (1845) 2 Jo & Lat 141 at 170; *Stroud v Norman* (1854) Kay 313; *Roberts v Dixwell* (1738) Sugden on Powers (8th Edn) App 930; *Graham v Angell* (1869) 17 WR 702; *Butler v Butler* (1880) 7 LR 401. Contrast *Re Staveley, Dyke v Staveley* (1920) 90 LJ Ch 111 (gift over on contingency too remote).

2 *Re Staples, Fitzherbert v Midland Bank Executor and Trustee Co Ltd* [1933] IR 126.

3 *Harvey v Stracey* (1852) 1 Drew 73 at 136; *Re Farncombe's Trusts* (1878) 9 ChD 652; *Re Coulman, Munby v Ross* (1885) 30 ChD 186. As to appointments to objects and non-objects mixed see PARA 354 et seq post.

4 *Long v Ovenden* (1881) 16 ChD 691; *Re Lambert, Lambert v Lambert* [1910] 1 IR 280, Ir CA.

5 See *Caulfield v Maguire* (1845) 2 Jo & Lat 141.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/282. Effect of previous invalid appointment.

### **282. Effect of previous invalid appointment.**

A power may be well exercised notwithstanding a previous invalid execution<sup>1</sup>, but if the invalidity is due to fraud, the validity of the second execution depends on proof that fraud no longer exists<sup>2</sup>. In a second execution there must be some expression of an intention to exercise the power, but it seems that an expressed intention to pass the property which is the subject of the power, and apt words to execute the power, suffice without any expressed intention to retract the invalid execution<sup>3</sup>. Further, although the mere expression of a desire to confirm an invalid appointment does not establish it, the execution of an actual confirmation will do so, provided events have since occurred which render such an appointment unobjectionable<sup>4</sup>.

1 *Hervey v Hervey* (1739) 1 Atk 561 at 567 per Lord Hardwicke; *Edwards v Sleater* (1665) Hard 410; *Tippet v Eyres* (1690) 5 Mod Rep 457 per Ventris J; *Hole v Escott* (1838) 4 My & Cr 187; *Ward v Tyrrell* (1858) 25 Beav 563.

2 See PARA 369 post.

3 *Jackson v Jackson* (1843) Drury temp Sug 91; *Carver v Richards* (1859) 27 Beav 488 (affd (1860) 1 De GF & J 548).

4 *Morgan v Gronow* (1873) LR 16 Eq 1. See also *Armytage v Armytage* (1842) 1 Y & C Ch Cas 461.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/283. Divesting of vested interest.

### **283. Divesting of vested interest.**

The existence of a power of appointment does not prevent the vesting of the property subject to the power in the persons entitled in default of the appointment until the power is exercised. This is so whether the power precedes or follows the limitation or gift in default, and whether it is exercisable by deed or by will<sup>1</sup>. The same principle applies where there is no express gift in default of appointment, but a direct gift coupled with a power of selection or distribution<sup>2</sup>. Thus, if a life interest determines, pending the exercise of a subsisting power, any income not otherwise disposed of passes to those entitled in default of appointment<sup>3</sup>. However, the exercise of the power in favour of an object or objects<sup>4</sup> divests, either wholly or partially according to the terms of the appointment, the estates limited in default of appointment and creates new estates, whether the property is real or personal<sup>5</sup>. The divesting of a defeasible interest in possession may give rise to a chargeable event for the purposes of inheritance tax<sup>6</sup> and to a charge to capital gains tax<sup>7</sup>. The existence of a power to accumulate income will prevent the vesting in possession of the income in persons entitled in default of the exercise of

the power<sup>8</sup>. The exercise of a power of appointment may also create a vested interest liable to divest, if the object fails to satisfy a contingency, such as attaining a specific age<sup>9</sup>.

1 *Cunningham v Moody* (1748) 1 Ves Sen 174; *Doe d Willis v Martin* (1790) 4 Term Rep 39 at 65; *Re Rush, Warre v Rush* [1923] 1 Ch 56, CA (affd on another point sub nom *Public Trustee v Wolf* [1923] AC 544, HL); but see *Heron v Stokes* (1842) 2 Dr & War 89 (revsd (1845) 12 Cl & Fin 161).

2 See *Lambert v Thwaites* (1866) LR 2 Eq 151; *Re Hughes, Hughes v Footner* [1921] 2 Ch 208; *Re Clarke, Bracey v Royal National Lifeboat Institution* [1923] 2 Ch 407 at 419. See also *Re Bulteel's Settlements, Bulteel v Manley* [1917] 1 Ch 251, which related to the Bankruptcy Act 1914 s 42(2) (repealed) (see now the Insolvency Act 1986 ss 339, 423-425) and where there was an interest under a revocable appointment and the interest was revoked and a new appointment made.

3 *Re Master's Settlement, Master v Master* [1911] 1 Ch 321; *Re Cooper, Townend v Townend* (1917) 86 LJ Ch 507, where the preceding estate determined before any appointment could take effect and while persons who would take in default were still not ascertained. See also *Coleman v Seymour* (1749) 1 Ves Sen 209; *Haswell v Haswell* (1860) 2 De GF & J 456 at 460, 462; *Re Aylwin's Trusts* (1873) LR 16 Eq 585; and *Re Chartres, Farman v Barrett* [1927] 1 Ch 466, where the donee released his power and the one member of the class reached 21 years of age within the period, and the class in default of appointment closed at the end of that period.

4 See *Re Wicks' Marriage Settlement, Public Trustee v Wicks* [1940] Ch 475 at 478; *Re Hoff, Carnley v Hoff* [1942] Ch 298, [1942] 1 All ER 547. As to the use of the word 'object' see PARA 209 note 1 ante.

5 *Walker v Armstrong* (1856) 21 Beav 284 (varied on appeal on other grounds 8 De GM & G 531); *Re Vizard's Trusts* (1866) LR 1 Eq 667 (affd 1 Ch App 588); *Lee v Olding* (1856) 25 LJ Ch 580; *De Serre v Clarke* (1874) LR 18 Eq 587; *Re Dickinson's Settlements, Bickersteth v Dickinson* [1939] Ch 27; *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920; *Re de la Bere's Marriage Settlement Trusts, de la Bere v Public Trustee* [1941] Ch 443, [1941] 2 All ER 533. But see *Re Frowd's Settlement* (1864) 4 New Rep 54; *Sweetapple v Horlock* (1879) 11 ChD 745; *Tremayne v Rashleigh* [1908] 1 Ch 681; *Re O'Connell, Mawle v Jagoe* [1903] 2 Ch 574; *A-G v Earl of Selborne* [1902] 1 KB 388, CA; *Re Maddy's Estate, Maddy v Maddy* [1901] 2 Ch 820; *Lovett v Lovett* [1898] 1 Ch 82; *Jackson v Stamps Comr* [1903] AC 350 at 354, PC; *Duke of Northumberland v IRC* [1911] 2 KB 343 at 354 (revsd [1911] 2 KB 1011, CA); *Re Marquis of Bath's Settlement, Thynne v Stewart* (1914) 111 LT 153 (which held that the meaning of 'everything passing under the will' is a matter of construction); *Re Rush, Warre v Rush* [1922] 1 Ch 302, CA (affd sub nom *Public Trustee v Wolf* [1923] AC 544, HL). Contrast *Parr v A-G* [1926] AC 239 at 273, HL (restoration and confirmation of life estate by a resettlement).

6 See INHERITANCE TAXATION vol 24 (Reissue) PARA 486.

7 See CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 121.

8 See *Pearson v IRC* [1981] AC 753, [1980] 2 All ER 479, HL; and INHERITANCE TAXATION vol 24 (Reissue) PARA 479. See also *Lord Inglewood v IRC* [1983] STC 133, [1983] 1 WLR 366, CA; and INHERITANCE TAXATION vol 24 (Reissue) PARA 507.

9 *Re Penton's Settlements, Humphreys v Birch-Reynardson* [1968] 1 All ER 36, [1968] 1 WLR 248. But see *Re Delamere's Settlement Trusts, Kenny v Cunningham-Reid* [1984] 1 All ER 584, [1984] 1 WLR 813, CA (minors appointed 'absolutely').

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iii) Construction/284. Burden of proof.

## 284. Burden of proof.

The burden of proving an intention to execute a power voluntarily is in general upon the person seeking to set up the appointment<sup>1</sup>, but if the person alleging the execution is a purchaser there seems to be a presumption in his favour<sup>2</sup>.

1 As to the burden of proof of a contrary intention for the purposes of the Wills Act 1837 s 27 see PARA 314 note 8 post.

2 *Pennefather v Pennefather* (1873) 7 IR Eq 300; *Blake v Marnell* (1811) 2 Ball & B 38n at 39n per Lord Redesdale LC; *Wilson v Piggott* (1794) 2 Ves 351; *L'Estrange v L'Estrange* (1890) 25 LR Ir 399; *Minchin v Minchin* (1871) 5 IR Eq 258 at 268, Ir CA; *Watson v Marshall* (1918) 145 LT Jo 129.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iv) Enforcement of Execution/285. Covenants to exercise powers.

## **(iv) Enforcement of Execution**

### **285. Covenants to exercise powers.**

A specifically enforceable contract for the execution of a general power is a good execution of a power in equity. Specific performance may be granted of a contract for valuable consideration to exercise a general power otherwise than by will<sup>1</sup>, but if the power is exercisable by will damages are the only remedy<sup>2</sup>. If the power is special neither remedy is available<sup>3</sup>. The donee of a special power may release it or by negative covenant fetter his power to exercise it; and, so far as such a fetter extends, the property must go as in default of appointment<sup>4</sup>.

1 *Re Dykes' Estate* (1869) LR 7 Eq 337. But see *Morgan v Milman* (1853) 3 De GM & G 24; *Gas Light and Coke Co v Towse* (1887) 35 ChD 519. As to contingent powers see PARAS 332-336 post. As to powers of jointuring see PARA 248 et seq ante. As to the remedy of specific performance generally see SPECIFIC PERFORMANCE.

2 *Re Parkin, Hill v Schwarz* [1892] 3 Ch 510; *Beyfus v Lawley* [1903] AC 411, HL; *Robinson v Ommanney* (1882) 21 ChD 780 (affd (1883) 23 ChD 285, CA). As to damages generally see DAMAGES.

3 *Thacker v Key* (1869) LR 8 Eq 408; *Bulsteel v Plummer* (1870) 6 Ch App 160; *Re Bradshaw, Bradshaw v Bradshaw* [1902] 1 Ch 436 at 447; *Palmer v Locke* (1880) 15 ChD 294, CA; *Re Cooke, Winckley v Winterton* [1922] 1 Ch 292.

4 As to release see *Re Evered, Molineux v Evered* [1910] 2 Ch 147, CA; and PARAS 376-378 post. Contrast *Re Cooke, Winckley v Winterton* [1922] 1 Ch 292.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iv) Enforcement of Execution/286. Control of exercise by the court.

### **286. Control of exercise by the court.**

The court will not exercise, or compel trustees to exercise, a purely discretionary power, even if the trustees are under a duty to consider exercising it<sup>1</sup>; neither will it insist on the trustees applying a particular principle in reaching a decision<sup>2</sup>. However, in the case of a mere fiduciary power, trustees must consider: (1) periodically whether or not they should exercise the powers; (2) the range of objects of the power; and (3) the appropriateness of individual appointments<sup>3</sup>. The court will restrain trustees from improperly exercising the power<sup>4</sup>. If the power is coupled with a duty, the court may compel the trustees to perform that duty<sup>5</sup>, and, if called on to do so, the court will execute a discretionary trust in the manner best calculated to give effect to the settlor's intentions<sup>6</sup>. This may involve appointing new trustees, authorising the preparation of a scheme of distribution or adopting whichever method appears most appropriate in the circumstances<sup>7</sup>. Thus the court will not interfere with the execution in good faith of a power of appointment<sup>8</sup>, even if the appointment did not have the effect intended by the trustees<sup>9</sup>; nor



will it usually control powers of maintenance given to trustees<sup>10</sup>. However, the court will intervene if the trustees refuse to exercise their discretion<sup>11</sup> or act capriciously<sup>12</sup>. It will also intervene: (a) where the result of the trustees' action is unauthorised by the power; (b) where it is clear that before acting they improperly took into account matters which they should have ignored<sup>13</sup>; (c) where they failed to consider matters which they should have taken into account<sup>14</sup>; or (d) where their decision is one which no reasonable body of trustees properly directing themselves could have reached<sup>15</sup>. The court may also consider an object's legitimate expectation<sup>16</sup>.

The court will decline to order disclosure of documents bearing on the trustees' deliberations which led to a decision on a discretionary matter<sup>17</sup>. Unless bad faith on the part of the trustees can be established, the court will not interfere with the exercise of a discretion which is expressed to be absolute or uncontrollable<sup>18</sup>. The object of a power can, however, obtain an order against a defendant for the purposes of discovery only identifying the trustees, with a view to communicating his circumstances and claims to the trustees, and ascertaining information as to the trust fund<sup>19</sup>.

1 *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens* [1970] AC 508 at 525, [1968] 3 All ER 785 at 793, HL, per Lord Upjohn; *McPhail v Doulton* [1971] AC 424 at 456, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce. See also *Re Gordon's Will Trusts, National Westminster Bank Ltd v Gordon* [1977] Ch 27, [1976] 2 All ER 577 (revsd [1978] Ch 145, [1978] 2 All ER 969, CA); and TRUSTS vol 48 (2007 Reissue) PARA 971.

2 *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17 at 25, [1973] 2 All ER 1203 at 1210 per Templeman J; *Re Murphy's Settlements, Murphy v Murphy* [1998] 3 All ER 1 at 9, 12, [1999] 1 WLR 282 at 290, 293 per Neuberger J.

3 *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202; *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 545-546, [1990] 1 WLR 1587 at 1614 per Warner J.

4 *Vestey v IRC (No 2)* [1979] Ch 198 at 206, [1979] 2 All ER 225 at 235, DC, per Walton J; affd [1980] AC 1148, [1979] 3 All ER 976, HL.

5 *Nickisson v Cockill* (1863) 3 De GJ & Sm 622; *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Tempest v Lord Camoys* (1882) 21 ChD 571, CA; *Wilson v Turner* (1883) 22 ChD 521, CA; *Re Gadd, Eastwood v Clark* (1883) 23 ChD 134, CA; *Re Courtier, Coles v Courtier, Courtier v Coles* (1886) 34 ChD 136, CA; *Re Bryant, Bryant v Hickley* [1894] 1 Ch 324; *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379, CA. See also *Re Steed's Will Trusts, Sandford v Stevenson* [1959] Ch 354 at 361, [1959] 1 All ER 609 at 612 (affd [1960] Ch 407, [1960] 1 All ER 487, CA); and see *Re Gulbenkian's Will Trusts, Whishaw v Stephens* [1970] AC 508 at 525, [1968] 3 All ER 785 at 793, HL, per Lord Upjohn. As to the need for unanimity among trustees exercising powers see TRUSTS vol 48 (2007 Reissue) PARA 953.

6 *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce; and see PARA 213 ante.

7 *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL per Lord Wilberforce; and see *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 548-549, [1990] 1 WLR 1587 at 1617 per Warner J.

8 *Beyfus v Bullock* (1869) LR 7 Eq 391. See also *Costabadie v Costabadie* (1847) 6 Hare 410; *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440; *Lord v Bunn* (1843) 2 Y & C Ch Cas 98; *Talbot v Marshfield* (1868) 3 Ch App 622; *Marquis of Camden v Murray* (1880) 16 ChD 161. See also *Re Londonderry's Settlement, Peat v Walsh* [1965] Ch 918, [1964] 3 All ER 855, CA, where the court refused to order the disclosure of trust documents containing the trustees' reasons.

9 *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.

10 *Sillibourne v Newport* (1855) 1 K & J 602; *Brophy v Bellamy* (1873) 8 Ch App 798; *Re Lofthouse* (1885) 29 ChD 921, CA; *Wilson v Turner* (1883) 22 ChD 521, CA; *Re Bryant, Bryant v Hickley* [1894] 1 Ch 324.

11 *Hewett v Hewett* (1765) 2 Eden 332; *White v Grane* (1854) 18 Beav 571; *Goldsmid v Goldsmid* (1815) 19 Ves 368; *Klug v Klug* [1918] 2 Ch 67, where one trustee refused to exercise her discretion for personal motives; *Re Locker's Settlement Trusts, Meachem v Sachs* [1978] 1 All ER 216, [1977] 1 WLR 1323. See also *Re 90 Thornhill Road, Tolworth, Surrey, Barker v Addiscott* [1970] Ch 261, [1969] 3 All ER 685; and TRUSTS vol 48 (2007 Reissue) PARA 1067.

- 12 *Re Hodges, Davey v Ward* (1878) 7 ChD 754; *Re Roper's Trusts* (1879) 11 ChD 272.
- 13 *Edge v Pensions Ombudsman* [1998] 2 All ER 547 at 568, [1998] 3 WLR 466 at 487 per Sir Richard Scott V-C.
- 14 *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA; *Turner v Turner* [1984] Ch 100, [1983] 2 All ER 745; *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27, CA; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718 per Robert Walker J.
- 15 *Edge v Pensions Ombudsman* [1998] 2 All ER 547 at 568, [1998] 3 WLR 466 at 487 per Sir Richard Scott V-C.
- 16 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718 per Robert Walker J.
- 17 *Re Londonderry's Settlement, Peat v Walsh* [1965] Ch 918, [1964] 3 All ER 855, CA; but see *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 719 per Robert Walker J, where it was suggested that trustees might be compelled legally or practically to disclose the substance of the reasons for their decision.
- 18 *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Re Hodges, Davey v Ward* (1878) 7 ChD 754; *Tabor v Brooks* (1878) 10 ChD 273; *Re Londonderry's Settlement, Peat v Walsh* [1965] Ch 918, [1964] 3 All ER 855, CA; but see *Re Brown, Brown v Brown* (1885) 52 LT 853.
- 19 *Re Murphy's Settlements, Murphy v Murphy* [1998] 3 All ER 1 at 9, 11-12, [1999] 1 WLR 282 at 289, 292 per Neuberger J.

## UPDATE

### 286 Control of exercise by the court

NOTE 14--*Hastings-Bass*, cited, applied: *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), (2006) 8 ITELR 917. See *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693 (appointment set aside where trustees failed to understand and therefore to take into account tax implications).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(iv) Enforcement of Execution/287. Surrender of discretion.

### 287. Surrender of discretion.

Trustees may surrender the exercise of their discretion to the court<sup>1</sup>, but may not surrender their discretion in a way which will free them from the obligation of exercising it in the future<sup>2</sup>. Trustees who surrender their discretion are obliged to provide the court with all the information necessary for it to make a decision<sup>3</sup>.

1 See *Thrells Ltd v Lomas* [1993] 2 All ER 546, [1993] 1 WLR 456.

2 *Re Allen-Meyrick's Will Trusts, Mangnall v Allen-Meyrick* [1966] 1 All ER 740, [1966] 1 WLR 499.

3 *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, PC.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(v) Delegation of Powers/288. Categories of powers.

## (v) Delegation of Powers

### 288. Categories of powers.

In relation to delegation, there are three categories of powers, namely: (1) general and hybrid powers<sup>1</sup>; (2) powers to do merely ministerial acts<sup>2</sup>; and (3) powers implying a personal discretion<sup>3</sup>. In general, powers in the first two categories may be delegated, but those in the third category may not.

1 See PARA 289 post.

2 See PARA 290 post.

3 See PARA 291 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(v) Delegation of Powers/289. General and hybrid powers.

### 289. General and hybrid powers.

A general power<sup>1</sup>, or a hybrid power<sup>2</sup> virtually amounting to a general power, may be delegated when vested in a person beneficially<sup>3</sup>. Thus an executor is regarded as absolute owner of the testator's personalty, and so may delegate his power to collect debts<sup>4</sup> and, in a mortgage of leaseholds, may include a power of sale<sup>5</sup>. A power to mortgage authorises a mortgage with a power of sale<sup>6</sup>. Any delegation may be either voluntary or involuntary, that is by operation of law, as on bankruptcy<sup>7</sup>, mental disorder<sup>8</sup> or under a charge imposed by the court for securing the payment of money due or to become due under a judgment or order<sup>9</sup>.

1 *Combe's Case* (1613) 9 Co Rep 75a; *White v Wilson* (1852) 1 Drew 298 at 304.

2 As to hybrid powers see PARA 205 ante.

3 *Re Triffitt's Settlements*, *Hall v Hyde* [1958] Ch 852, [1958] 2 All ER 299. An intermediate power vested in trustees as such cannot be delegated: *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

4 *Earl of Vane v Rigden* (1870) 5 Ch App 663.

5 *Russell v Plaice* (1854) 18 Beav 21. Contrast *Sanders v Richards* (1846) 2 Coll 568. See also *Cruikshank v Duffin* (1872) LR 13 Eq 555; *Ricketts v Lewis* (1882) 20 ChD 745; *Thorne v Thorne* [1893] 3 Ch 196; and EXECUTORS AND ADMINISTRATORS.

6 *Bridges v Longman* (1857) 24 Beav 27; *Bennett v Wyndham* (1857) 23 Beav 521; *Selby v Cooling* (1857) 23 Beav 418; *Cook v Dawson* (1861) 29 Beav 123 at 128; *Re Chawner's Will* (1869) LR 8 Eq 569. See also *Pearson v Benson* (1860) 28 Beav 598. See to the contrary *Drake v Whitmore* (1852) 19 LTOS 243; *Clarke v Royal Panopticon* (1857) 4 Drew 26; and MORTGAGE vol 77 (2010) PARA 440.

7 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 400, 404, 461. See also *Re Baker* [1936] Ch 61 at 66, where the power to revoke the trusts of a settlement with the consent of the trustees or of a judge of the Chancery Division was held to be exercisable by the trustee in bankruptcy.

8 See the Mental Health Act 1983 s 96; and MENTAL HEALTH vol 30(2) (Reissue) PARA 701.

9 See the Charging Orders Act 1979 s 2; and CIVIL PROCEDURE vol 12 (2009) PARA 1468.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(v) Delegation of Powers/290. Ministerial powers.

## **290. Ministerial powers.**

A power may be delegated if it is merely ministerial and involves the exercise of no personal discretion<sup>1</sup>.

<sup>1</sup> *Ingram v Ingram* (1740) 2 Atk 88; *A-G v Berryman* (1752) cited 2 Ves Sen 643; *Alexander v Alexander* (1755) 2 Ves Sen 640; *Chester v Chadwick* (1842) 13 Sim 102.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(1) EXERCISE OF POWERS IN GENERAL/(v) Delegation of Powers/291. Discretionary powers.

## **291. Discretionary powers.**

Trustees may not delegate a power involving the exercise of a personal discretion unless they have authority to do so<sup>1</sup>. This extends to intermediate powers of appointment<sup>2</sup>. On application, the court may give trustees power to delegate their power of investment<sup>3</sup>. Trustees of pension trust schemes have a limited right to delegate their powers of investment to fund managers<sup>4</sup>. There is a statutory right to delegate all or any of the trust's powers and discretions vested in the trustee for a period not exceeding 12 months<sup>5</sup>. Trustees of a trust of land can by a power of attorney delegate to any beneficiary or beneficiaries of full age and entitled to an interest in possession in land, any of their functions as trustees which relate to land<sup>6</sup>. Apart from these permitted delegations, any other attempted delegation is a mere nullity<sup>7</sup>, even if the objects of the delegated power are also objects of the original power<sup>8</sup>. A power to consent to the execution of a power<sup>9</sup> falls under this head unless a right of delegation can be implied<sup>10</sup>. A trustee may not delegate a power of sale to his co-trustees in order to buy the trust property himself<sup>11</sup>; and a tenant for life of settled land may not delegate his powers<sup>12</sup>. However, powers ancillary to those validly conferred will be valid, as with powers of postponement and management where there was a valid appointment on trust for sale<sup>13</sup>.

Under a special power, an appointment on protective trusts<sup>14</sup> is void as to those trusts as being a prospective delegation of the discretionary power to dispose of income under those trusts<sup>15</sup>; and an appointment in effect authorising the conversion of a contingent interest into a vested interest, with the consequent destruction of other contingent interests, is also void<sup>16</sup>.

Under a power in wide terms authorising an appointment to the objects in such manner and form in all respects for the benefit of the objects as the donee appoints, an appointment may not make a general delegation of the power<sup>17</sup> but may validly confer an ordinary power of advancement on the trustees of a settlement, whether the appointment is of vested<sup>18</sup> or contingent<sup>19</sup> interests<sup>20</sup>. Indeed, a settlement made under or exercising a power of advancement will not be invalid as a delegation of the power or as providing for non-objects of that power, because the exercise of this type of a power, as distinct from a special power of appointment, takes the property appointed out of the trusts of the instrument creating the power<sup>21</sup>. Again, the statutory power for parents to appoint testamentary guardians for their children<sup>22</sup> allows an appointment of guardians to authorise the surviving guardian to nominate a person in place of a deceased guardian<sup>23</sup>. Moreover, the implied power of a corporation to elect corporators in order to preserve the corporation may be delegated to a select part of themselves, but not to a stranger<sup>24</sup>, and a majority of that select part can bind the minority<sup>25</sup>. Pension scheme trustees can authorise two or more of their number to exercise discretions relating to investment decisions on their behalf<sup>26</sup>.

- 1 *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL; *Re Manisty's Settlement*, *Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203. See also *Combes's Case* (1613) 9 Co Rep 75a; *De Bussche v Alt* (1878) 8 ChD 286 at 310, CA; *Re Morris's Settlement Trusts*, *Adams v Napier* [1951] 2 All ER 528, CA; and AGENCY vol 1 (2008) PARA 48 et seq.
- 2 *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.
- 3 *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167.
- 4 See the Pensions Act 1995 s 34.
- 5 See the Trustee Act 1925 s 25(1) (as amended); and AGENCY vol 1 (2008) PARA 48 et seq; TRUSTS vol 48 (2007 Reissue) PARA 984.
- 6 Trusts of Land and Appointment of Trustees Act 1996 s 9(1). See also SETTLEMENTS vol 42 (Reissue) PARA 903.
- 7 *Carr v Atkinson* (1872) IR 14 Eq 397.
- 8 *Williamson v Farwell* (1887) 35 ChD 128 at 141; *Stockbridge v Story* (1871) 19 WR 1049; *Webb v Sadler* (1873) 8 Ch App 419; *Burnaby v Baillie* (1889) 42 ChD 282.
- 9 *Hawkins v Kemp* (1803) 3 East 410.
- 10 le as it can be where, at the creation of the power, it is obvious that the donee of the power will not always be able to act in person: *Stuart v Norton* (1860) 9 WR 320, PC.
- 11 *Bulteel v Lord Abinger* (1842) 6 Jur 410.
- 12 See the Settled Land Act 1925 s 104(1), (12); and SETTLEMENTS vol 42 (Reissue) PARA 777; but see *Re Craven Settled Estates* [1926] Ch 985.
- 13 See *Re Ainsworth*, *Re Yates*, *Yates v Wormald* [1921] 2 Ch 179; and note 6 supra.
- 14 See the Trustee Act 1925 s 33 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 917.
- 15 *Re Boulton's Settlement Trust*, *Stewart v Boulton* [1928] Ch 703; *Re Morris's Settlement Trusts*, *Adams v Napier* [1951] 2 All ER 528, CA; *Re Hunter's Will Trusts*, *Gilks v Harris* [1963] Ch 372, [1962] 3 All ER 1050.
- 16 *Re Joicey*, *Joicey v Elliot* [1915] 2 Ch 115, CA.
- 17 *Re Morris's Settlement Trusts*, *Adams v Napier* [1951] 2 All ER 528, CA; *Re Triffitt's Settlement*, *Hall v Hyde* [1958] Ch 852 at 862, [1958] 2 All ER 299 at 303; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.
- 18 *Re May's Settlement*, *Public Trustee v Meredith* [1926] Ch 136.
- 19 *Re Mewburn's Settlement*, *Perks v Wood* [1934] Ch 112, distinguishing *Re Greenslade*, *Greenslade v McCowen* [1915] 1 Ch 155, as decided on the narrow language of the power in that case. Contrast *Re Joicey*, *Joicey v Elliot* [1915] 2 Ch 115, CA. See also the Trustee Act 1925 s 32 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 76 et seq.
- 20 See *Re Morris's Settlement Trusts*, *Adams v Napier* [1951] 2 All ER 528, CA; *Re Wills' Will Trusts*, *Wills v Wills* [1959] Ch 1 at 11-13, [1958] 2 All ER 472 at 477-478.
- 21 See *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL; *Re Hastings-Bass*, *Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.
- 22 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 148-149.
- 23 *Re Parnell's Goods* (1872) LR 2 P & D 379.
- 24 *R v Bird* (1811) 13 East 367.
- 25 *R v Varlo* (1775) 1 Cowp 248; *R v Monday* (1777) 2 Cowp 530; *Smyth v Darley* (1849) 2 HL Cas 789; and see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1203 et seq.

26 Pensions Act 1995 s 34(5)(a).

## **UPDATE**

### **291 Discretionary powers**

NOTE 4--Pensions Act 1995 s 34 amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 139 and amended by Pensions Act 2004 Sch 12 para 49.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(2) EXERCISE BY INSTRUMENT INTER VIVOS/292. Statutory provisions.

## **(2) EXERCISE BY INSTRUMENT INTER VIVOS**

### **292. Statutory provisions.**

In executing a power the donee must follow its exact terms. Nevertheless, by statute a deed executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, is, as respects its execution and attestation, a valid exercise of a power to appoint by deed or by an instrument in writing but not of a power to appoint by will<sup>1</sup>, even if it is expressly required that a deed or instrument in writing made in exercise of the power must be executed or attested with some additional or other form of execution or attestation or solemnity<sup>2</sup>.

1 As to the execution of powers of appointment by will see the Wills Act 1837 s 10; and PARA 297 et seq post.

2 Law of Property Act 1925 s 159 (replacing the Law of Property Amendment Act 1859 s 12, applying to deeds executed after 13 August 1859). See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 48.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(2) EXERCISE BY INSTRUMENT INTER VIVOS/293. Attestation.

### **293. Attestation.**

Except where the statutory provisions<sup>1</sup> apply, if a power requires two or more formalities to be observed, and the attestation clause expressly certifies that one of those formalities has been performed, then the power is not well executed. However, if the attestation, although a limited and special one, is of such a nature that it must necessarily be inferred that the other requisites were complied with, or if the attestation is general, then the execution is valid unless the contrary is shown<sup>2</sup>.

1 Ie the Wills Act 1837 s 10; and the Law of Property Act 1925 s 159. See PARA 292 ante.

2 *Vincent v Bishop of Sodor and Man* (1851) 4 De G & Sm 294; *Newton v Ricketts* (1861) 9 HL Cas 262; *Wright v Wakeford* (1811) 17 Ves 454; *Stanhope v Keir* (1824) 2 Sim & St 37; *Simeon v Simeon* (1831) 4 Sim 555; *Smith v Adkins* (1872) LR 14 Eq 402; *Mackinley v Sison* (1837) 8 Sim 561; *Waterman v Smith* (1840) 9 Sim 629; *Bartholomew v Harris* (1845) 15 Sim 78; *Burdett v Spilsbury* (1843) 10 Cl & Fin 340, HL; *Warren v Postlethwaite* (1845) 2 Coll 108; *Re Wrey's Trust* (1850) 17 Sim 201.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(2) EXERCISE BY INSTRUMENT INTER VIVOS/294. Successive appointments.

## 294. Successive appointments.

A power is normally not necessarily exhausted by being exercised once<sup>1</sup>. It may in general be executed by different appointments made at various times; and a partial execution, even if the power is non-exclusive<sup>2</sup>, need not give a share to every object<sup>3</sup>. Thus a life interest may be appointed on one occasion and the fee simple on another<sup>4</sup>. Even where the power is to be executed by one instrument it may be executed by several assurances which, although insufficient if taken singly, operate together as one complete act; but, in order to enable the court to read the whole series as one instrument, this must have been the intention of the parties expressed on the perfection of the first assurance<sup>5</sup>.

1 See PARA 384 post.

2 As to non-exclusive powers see PARA 278 ante.

3 *Wilson v Piggott* (1794) 2 Ves 351 at 354; *Bristow v Warde* (1794) 2 Ves 336; *Lee's Case* (1571) 1 And 67 (power of revocation); *Co Litt* 237a; *Digges' Case* (1600) 1 Co Rep 173a (power to revoke uses); *Snape v Turton* (1637) Cro Car 472; *Bovey v Smith* (1692) 15 Lords Journals 275, HL (general power of appointment); *Hervey v Hervey* (1739) 1 Atk 561 (power to raise portions); *Zouch d Woolston v Woolston* (1761) 2 Burr 1136 (power to jointure); *Doe d Milborne v Milborne* (1788) 2 Term Rep 721. But see to the contrary *Brown v Nisbett* (1750) 1 Cox Eq Cas 13, as to which see *Webster v Boddington* (1848) 16 Sim 177; *Re Simpson's Settlement* (1851) 4 De G & Sm 521; *Cuninghame v Anstruther* (1872) LR 2 Sc & Div 223; *Sumpton v Genner* (1667) 2 Keb 261. The powers conferred by the Settled Land Act 1882 upon a tenant for life or trustees, or the court, or the Land Commissioners, were expressly made exercisable from time to time: see s 55(1) (repealed), which was not re-enacted by the Settled Land Act 1925. However, the Interpretation Act 1978 ss 12(1), 22(1), Sch 2 para 3 make a similar provision applicable to all powers conferred by Acts passed after 1889.

4 *Bovey v Smith* (1692) 15 Lords Journals 275, HL.

5 *Lord Braybrooke v A-G* (1861) 9 HL Cas 150 at 167.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(2) EXERCISE BY INSTRUMENT INTER VIVOS/295. Incidents of successive appointments.

## 295. Incidents of successive appointments.

The costs of successive appointments are borne rateably by the appointees<sup>1</sup>. If some of a number of appointments are expressed to carry interest from the death of the appointor, then in the absence of a contrary intention the remainder will be presumed to carry interest<sup>2</sup>. The donee of a power making a partial appointment may not, in respect of the unappointed part, alter the range of investments authorised by the instrument creating the power<sup>3</sup>.

1 *Re Chisholm, Goddard v Brodie* [1902] 1 Ch 457; and see PARA 300 post.

2 *Re Grant, Nevins v United Kingdom Temperance and General Provident Institution* (1915) 85 LJ Ch 31.

3 *Re William Falconer's Trusts, Re Ann Falconer's Trusts, Property and Estates Co Ltd v Frost* [1908] 1 Ch 410.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(2) EXERCISE BY INSTRUMENT INTER VIVOS/296. Appointment by way of mortgage.

## **296. Appointment by way of mortgage.**

In an appointment by way of mortgage<sup>1</sup> the reservation of the right to redeem to persons other than those to whom the estate is limited in default of appointment in the deed creating the power is not of itself an appointment of the equity of redemption<sup>2</sup>. However, the appointment by way of mortgage may be intended to have a double operation so as not only to create a charge upon the property appointed, but also to alter the limitations upon which that property is held, in which case the appointment takes effect according to its terms<sup>3</sup>. The extent to which such an appointment operates depends entirely upon the intention to be drawn from the deed taken as a whole, but, if no indication of intention exists, there is a presumption that nothing more than a mortgage was meant<sup>4</sup>, and where the transaction was a mortgage by a husband of his wife's property, such a presumption was aided by that fact<sup>5</sup>.

1 As to the mode of effecting legal mortgages of freeholds and leaseholds generally see the Law of Property Act 1925 ss 85, 86; and MORTGAGE VOL 77 (2010) PARAS 190, 191.

2 *Ruscombe v Hare* (1828) 2 Bli NS 192; *Heather v O'Neil* (1858) 2 De G & J 399; *Whitbread v Smith* (1854) 3 De GM & G 727; Co Litt 47a, 208a, n; *Bates v Dandy* (1741) 2 Atk 207; *Pitt v Pitt* (1823) Turn & R 180; *Hipkin v Wilson* (1850) 3 De G & Sm 738; *Re Byron's Settlement, Williams v Mitchell* [1891] 3 Ch 474 at 481.

3 *Jackson v Innes* (1819) 1 Bli 104 at 114, HL; *Heather v O'Neil* (1858) 2 De G & J 399; *Reeve v Hicks* (1825) 2 Sim & St 403; *Barnett v Wilson* (1843) 2 Y & C Ch Cas 407; *Eddleston v Collins* (1853) 3 De GM & G 1 at 15.

4 *Heather v O'Neil* (1858) 2 De G & J 399; *Whitbread v Smith* (1854) 3 De GM & G 727; *Plomley v Felton* (1888) 14 App Cas 61, PC; *Jackson v Innes* (1819) 1 Bli 104, HL; *Re Betton's Trust Estates* (1871) LR 12 Eq 553 at 557.

5 See *Bates v Dandy* (1741) 2 Atk 207; *Whitbread v Smith* (1854) 3 De GM & G 727; *Martin v Mitchell* (1820) 2 Jac & W 413 at 424; *Clark v Burgh* (1845) 2 Coll 221. But see to the contrary, *Rowel v Walley* (1661) 1 Rep Ch 218; *Reeve v Hicks* (1825) 2 Sim & St 403; *Anson v Lee* (1831) 4 Sim 364; *Plowden v Hyde* (1852) 2 De GM & G 684; *Jackson v Innes* (1819) 1 Bli 104, HL; *Jones v Davies* (1878) 8 ChD 205 at 210. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/297. Attestation.

## **(3) EXERCISE BY WILL**

### **(i) In general**

#### **297. Attestation.**

No appointment made by will in exercise of any power is valid unless it is executed in the manner in which a will is required to be executed<sup>1</sup>; and every will so executed is, so far as regards its execution and attestation, a valid execution of a power of appointment by will even if it was expressly required<sup>2</sup> that a will made in exercise of the power should be executed with some additional or other form of execution or solemnity<sup>3</sup>. In determining whether a power of appointment has been validly exercised, the same set of rules applies, whether the power be general, special or hybrid<sup>4</sup>. The power is validly exercised if, but only if, the purported exercise: (1) complies with the requirements of the power; and (2) sufficiently indicates an intention to



exercise the power<sup>5</sup>. The above provisions are subject to the statutory principle that a general devise of the real estate of a testator: (a) is to be construed to include any real estate which he may have power to appoint as he thinks proper; and (b) operates as an execution of such a power, unless a contrary intention appears in the will<sup>6</sup>. When a nuncupative will is valid, as with a soldier in actual military service, it will suffice to exercise a power of appointment, whether general or special, over personalty<sup>7</sup> and also, it seems, realty<sup>8</sup>, even if the testator is a minor<sup>9</sup>.

If a power is described as exercisable 'in writing', and the donee exercises it by writing in the nature of a will, this is an 'appointment made by will' and accordingly is only valid if it is executed in the manner in which a will is required to be executed<sup>10</sup>, and the power is not properly exercised unless the writing is duly executed as a will<sup>11</sup>.

An English power of appointment will be validly exercised by a person domiciled abroad if that person has made a will which is recognised as an effective will in England<sup>12</sup>.

1 For the formalities required see WILLS vol 50 (2005 Reissue) PARA 351 et seq.

2 This refers to powers created after 1837 as well as to those created before 1838: *Hubbard v Lees and Purden* (1866) LR 1 Exch 255.

3 See the Wills Act 1837 s 10 which applies to wills made after 1837 (see s 34). As to the application of s 10 to powers exercisable 'in writing' see PARA 268 ante; and the text and notes 10-11 infra.

4 As to general and special powers see PARA 206 ante; and as to hybrid powers see PARA 205 ante.

5 *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418 at 430, [1971] 3 All ER 433 at 442 per Megarry J.

6 See the Wills Act 1837 s 27; and PARA 310 post.

7 See ibid ss 11 (as amended), 27, applying to wills made after 1837 (see s 34); and EXECUTORS AND ADMINISTRATORS. See also *Nixon v Prince* (1918) 34 TLR 444; *Re Earl of Chichester's Will Trusts, Pelham v Countess of Chichester* [1946] Ch 289, [1946] 1 All ER 722.

8 See the Wills (Soldiers and Sailors) Act 1918 s 3 (as amended) (applying to deaths after the Act); and EXECUTORS AND ADMINISTRATORS. See also *Re Earl of Chichester's Will Trusts, Pelham v Countess of Chichester* [1946] Ch 289 at 298, [1946] 1 All ER 722 at 729.

9 *Re Wernher, Wernher v Beit* [1918] 2 Ch 82, CA. See the Wills (Soldiers and Sailors) Act 1918 s 1 (as amended), which provides that a person can make a valid will at the age of eighteen; and EXECUTORS AND ADMINISTRATORS.

10 See the text to note 1 supra. The provision stated in the text to notes 2-3 supra does not apply to this type of power: see PARA 268 ante.

11 *Re Daly's Settlement* (1858) 25 Beav 456; *Re Barnett, Dawes v Ixer* [1908] 1 Ch 402, not following *Re Broad, Smith v Draeger* [1901] 2 Ch 86. Contrast para 268 ante. The definition of 'will' includes an appointment by will or by writing in the nature of a will in exercise of a power: Wills Act 1837 s 1. See also *Re Edmonstone, Bevan v Edmonstone* (1901) 49 WR 555; and WILLS vol 50 (2005 Reissue) PARA 301.

12 *Re Fenston's Settlement, Max-Muller v Simonsen* [1971] 3 All ER 1092, [1971] 1 WLR 1640. See also the Wills Act 1963 s 1. A will is treated as properly executed, in so far as it exercises a power of appointment, if its execution conforms to the law governing the essential validity of the power (s 2(1)(d)), and it is not to be regarded as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power (s 2(2)). See also CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 460-464.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/298. Probate.

## 298. Probate.

A will appointing personal property is not effective until admitted to probate<sup>1</sup>; and the same rule appears now to apply to an exercise of a general power of appointing real estate<sup>2</sup>. Any document recognised as a valid testamentary instrument by the court exercising probate jurisdiction is capable of operating as an execution of a power of appointment by will over personal estate<sup>3</sup>, and the probate of an English will made by a person domiciled in England is sufficient evidence of the due execution of the power so far as formalities are concerned<sup>4</sup>. The will of a donee of a power domiciled abroad is treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed or in the territory where, at the time of its execution or of the testator's death, the testator was domiciled or had his habitual residence, or in a state of which at either of those times he was a national<sup>5</sup>. Either probate will be granted or there will be a grant of administration with will annexed<sup>6</sup>.

1 *Ross v Ewer* (1744) 3 Atk 156 at 160; *Re Vallance, ex p Limehouse Board of Works* (1883) 24 ChD 177. Scottish confirmations and Northern Irish grants of representation are recognised in England and Wales without the necessity of resealing: see the Administration of Estates Act 1971 s 1(1).

2 See the Administration of Estates Act 1925 s 2(1); and EXECUTORS AND ADMINISTRATORS.

3 *Re Walker, MacColl v Bruce* [1908] 1 Ch 560, following *Re Price, Tomlin v Latter* [1900] 1 Ch 442; *Re Simpson, Coutts & Co v Church Missionary Society* [1916] 1 Ch 502; *Re Wilkinson's Settlement, Butler v Wilkinson* [1917] 1 Ch 620; *Re Wernher, Wernher v Beit* [1918] 2 Ch 82 at 93, CA, per Bankes LJ; *Re Fenston's Settlement, Max-Muller v Simonsen* [1971] 3 All ER 1092, [1971] 1 WLR 1640.

4 *Ward v Ward* (1848) 11 Beav 377.

5 Wills Act 1963 s 1.

6 See further EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/299. Joint testamentary power.

### **299. Joint testamentary power.**

A power given to two persons to appoint by will is well exercised by a joint will, which, upon being admitted to probate on the death of each of them, operates as from the death of the survivor<sup>1</sup>.

1 *Re Duddell, Roundway v Roundway* [1932] 1 Ch 585.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/300. Costs.

### **300. Costs.**

In the administration of estates the general rule is that the costs should come out of the residue<sup>1</sup>, but this does not apply to appointments. In the absence of a contrary direction in the will<sup>2</sup>, the costs of an action relating to an appointed fund are borne rateably by the appointed and the unappointed funds, and not wholly by the unappointed fund<sup>3</sup>, and tax and the costs of administering the fund are treated in the same way<sup>4</sup>.

1 See EXECUTORS AND ADMINISTRATORS.

2 *Davies v Fowler* (1873) LR 16 Eq 308; *Re Grant, Nevinston v United Kingdom Temperance and General Provident Institution* (1915) 85 LJ Ch 31 (estate duty (now inheritance tax) payable out of residuary appointed fund).

3 *Warren v Postlethwaite* (1845) 2 Coll 108 at 116; *Trollope v Routledge* (1847) 1 De G & Sm 662; *Moore v Dixon* (1880) 15 ChD 566; *Re Saunders, Saunders v Gore* [1898] 1 Ch 17 at 23, CA; *Re Chisholm, Goddard v Brodie* [1902] 1 Ch 457. Contrast *Re Grant, Nevinston v United Kingdom Temperance and General Provident Institution* (1915) 85 LJ Ch 31 (costs of all parties out of residuary appointed fund).

4 *Re Lambert's Estate, Stanton v Lambert* (1888) 39 ChD 626; *Re Croft, Deane v Croft* [1892] 1 Ch 652; *Re Bourne, Martin v Martin* [1893] 1 Ch 188; *Re Shaw, Tucket v Shaw* [1895] 1 Ch 343; *Re Countess of Orford, Cartwright v Duc del Balzo* [1896] 1 Ch 257; *Re Hill's Settlement Trusts, Hill v Equitable Reversionary Interest Society Ltd* (1896) 75 LT 477. See, however, *Re Wilson, Menteath v Campbell* (1878) 26 WR 848. Contrast *Re Poole, Poole v Poole* [1919] P 10 (administration with so much of the will as related to the appointed funds annexed: costs out of whole estate including appointed fund). As to the property out of which inheritance tax is payable see INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/301. Lapse.

### 301. Lapse.

The statutory rule that a lapsed devise falls into residue<sup>1</sup> does not apply to an appointment under a special power, for it is not a 'devise' for this purpose<sup>2</sup>. In the case of a general power, lapse may be excluded by an express appointment to the executors and administrators of the appointee in substitution for him, but the intention to exclude lapse must be clearly shown and the substitutional appointees definitely designated, for mere words of limitation do not suffice<sup>3</sup>. In the case of limited powers, lapse cannot be thus excluded unless the substituted appointees are objects of the power<sup>4</sup>.

1 See the Wills Act 1837 s 25; and WILLS vol 50 (2005 Reissue) PARA 474.

2 *Holyland v Lewin* (1884) 26 ChD 266, CA.

3 *Browne v Hope* (1872) LR 14 Eq 343; *Stevens v King* [1904] 2 Ch 30. See also *Re Ladd, Henderson v Porter* [1932] 2 Ch 219, where a will expressed to be made with the intent that it should take effect whether the testator survived or predeceased the appointee was held insufficient to prevent the lapse of the appointment.

4 *Maddison v Andrew* (1747) 1 Ves Sen 57; *Butcher v Butcher, Gooday v Butcher* (1812) 1 Ves & B 79.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/302. Lapse and residue.

### 302. Lapse and residue.

Where there is an appointment to two or more persons of an ascertained sum in definite fractions, no appointee can take more under that gift than the fraction expressed to be his, even if the remaining funds subsequently increase in value<sup>1</sup>. If fractions or fixed sums are appointed and then 'the rest' or 'the remainder' of the ascertained sum is appointed to another, he cannot claim any share which may lapse in consequence of the death of a former appointee in the testator's lifetime, or fail by reason of the appointee being a stranger to the power, if the

true construction of the appointment is that all that was intended to be given is a sum arrived at by subtracting the previously named sums from the whole fund<sup>2</sup>. However, if the intention is to appoint the residue strictly as residue, or to appoint the entire fund charged with the sums specified in the previous appointments, the residuary clause is read as an appointment of the entire fund subject to the appointments previously made, and not merely of the balance of the fund after the sums previously appointed have been deducted from it<sup>3</sup>.

<sup>1</sup> *Re Marquess of Abergavenny's Estate Act Trusts, Marquess of Abergavenny v Ram* [1981] 2 All ER 643, [1981] 1 WLR 843.

<sup>2</sup> *Falkner v Butler* (1765) Amb 514; *Easum v Appleford* (1840) 5 My & Cr 56; *Re Harries' Trust* (1859) John 199; *Harley v Moon* (1861) 1 Drew & Sm 623; *Lakin v Lakin* (1865) 34 Beav 443; *Baker v Farmer* (1868) 3 Ch App 537 at 540; *Swete v Tindal* (1874) 31 LT 223; *Champney v Davy* (1879) 11 ChD 949 at 958; *Bagge v Bagge* [1921] 1 IR 213. But see *Ratcliffe v Hampson* (1855) 1 Jur NS 1104; *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276; *Holyland v Lewin* (1884) 26 ChD 266, CA; *Wilkinson v Schneider* (1870) LR 9 Eq 423.

<sup>3</sup> *Oke v Heath* (1748) 1 Ves Sen 135; *Carter v Taggart* (1848) 16 Sim 423; *Re Meredith's Trusts* (1876) 3 ChD 757; *Champney v Davy* (1879) 11 ChD 949; *Re Hunt's Trusts* (1885) 31 ChD 308; *Duguid v Fraser* (1886) 31 ChD 449; *Re Crawshay, Crawshay v Crawshay* (1890) 43 ChD 615; *Burke Irwin's Trusts, Barrett v Barrett* [1918] 1 IR 350; *Re Whitrod, Burrows v Base* [1926] Ch 118.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/303. Lapse although issue left.

### 303. Lapse although issue left.

An appointment by will in exercise of a special power in favour of an object of the power is not preserved from lapse if the object predeceases the appointor and leaves issue living at the appointor's death<sup>1</sup>.

<sup>1</sup> *Holyland v Lewin* (1884) 26 ChD 266, CA; disapproving *Freme v Clement* (1881) 18 ChD 499. See also *Griffiths v Gale* (1844) 12 Sim 327 at 354; *Freeland v Pearson* (1867) LR 3 Eq 658. As to the effect of the Wills Act 1837 s 33 (as substituted) on general powers see WILLS vol 50 (2005 Reissue) PARA 460. Section 33 (as substituted) does not affect any will of a testator who died before 1 January 1983: see WILLS vol 50 (2005 Reissue) PARA 457 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/304. Abatement.

### 304. Abatement.

Where a fund is appointed by one and the same instrument in aliquot shares, the shares, in the event of a deficiency, abate proportionately; and, if specific sums in excess of the total are appointed, abatement is rateable<sup>1</sup>. Where, after the appointment of specific sums which are part of an ascertained<sup>2</sup> fund, 'all the rest' or 'all the remainder' of the fund is appointed to another, the latter appointment is treated as a gift of the exact amount left after deducting from the fund the specific amounts already given; and in the event of any deficiency in the fund all the appointments abate rateably<sup>3</sup>. If the intention is clear, the amount of a charge for portions on an estate covenanted to be bought for a certain sum may abate if the full amount is not forthcoming for the purchase of the estate to be charged<sup>4</sup>. In these circumstances the question is whether the intention is to appoint specific sums and a residue strictly as residue, or to appoint the entire fund charged with the specific sums.

- 1 *Laurie v Clutton* (1851) 15 Beav 65. See further EXECUTORS AND ADMINISTRATORS.
- 2 *Petre v Petre* (1851) 14 Beav 197; *Re Currie, Bjorkman v Lord Kimberley* (1888) 36 WR 752.
- 3 *Page v Leapingwell* (1812) 18 Ves 463; *Easum v Appleford* (1840) 5 My & Cr 56; *Haynes v Haynes* (1853) 3 De GM & G 590; *Booth v Alington* (1856) 6 De GM & G 613; *Elwes v Causton* (1862) 30 Beav 554; *Walpole v Aphorp* (1867) LR 4 Eq 37; *Re Saunders, Saunders v Gore* [1898] 1 Ch 17, CA; *Re Cruddas, Cruddas v Smith* [1900] 1 Ch 730, CA; *Butler v Blackall* [1907] 1 IR 405.
- 4 *Chambers v Chambers* (1730) Mos 333; *Miller v Huddleston* (1868) LR 6 Eq 65.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/305. Abatement of successive appointments.

### 305. Abatement of successive appointments.

If the appointment is not made so as to operate on a fund of unvarying amount, or if the appointor does not assume that a given sum or an estate of a given value will be available, the residuary appointment must bear the loss<sup>1</sup>. If there are successive independent appointments by separate instruments which in the aggregate more than exhaust the fund, the latest appointment must bear the loss<sup>2</sup>. However, if the appointments are all made by one instrument which at once takes effect as to all the objects, and the whole fund is given to several objects, one of whom is necessarily named last, the last-named must not be made to bear the loss merely because he is mentioned last<sup>3</sup>; to effect this result the intention must clearly appear, and the burden of proof lies on the person seeking to establish priority<sup>4</sup>. Where an appointment is made to take effect out of a trust fund generally and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment; the specifically appointed portion is only to be resorted to in the event of a deficiency<sup>5</sup>.

- 1 *Petre v Petre* (1851) 14 Beav 197; *De Lisle v Hodges* (1874) LR 17 Eq 440.
- 2 *Trollope v Routledge* (1847) 1 De G & Sm 662; *Stokes v Bridgman* (1878) 47 LJ Ch 759; *Wilson v Kenrick* (1885) 31 ChD 658; *Gilbert v Whitfield* (1882) 52 LJ Ch 210.
- 3 *Bulsteel v Plummer* (1870) 6 Ch App 160 at 162. See also PARA 339 post.
- 4 *Miller v Huddleston* (1851) 3 Mac & G 513.
- 5 *Morgan v Gronow* (1873) LR 16 Eq 1.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/306. Abatement and lapse.

### 306. Abatement and lapse.

Where a fund is appointed in sums of which the aggregate exceeds the total sum subject to the power, the lapse of any appointment augments the amount available for the rest<sup>1</sup>.

- 1 *Re Lyne's Estate, Sands v Lyne* (1869) LR Eq 482; *Eales v Drake* (1875) 1 ChD 217; *Barry v Barry* (1876) IR 10 Eq 397.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/307. Ademption.

### 307. Ademption.

An appointment under a power may be adeemed<sup>1</sup> in the same manner as a specific devise or bequest<sup>2</sup>. Although it is provided by statute that no conveyance or other act made or done subsequently to the execution of a will, except the revocation of the will, can prevent the operation of the will with respect to any property which the testator has power to dispose of by will at the time of his death<sup>3</sup>, this provision does not apply to cases where the thing meant to be given is gone<sup>4</sup>. Hence a testamentary appointment is adeemed by a subsequent defective execution of the power if the defect is such as equity can aid<sup>5</sup>, but not by an absolutely invalid appointment<sup>6</sup>.

1 As to ademption generally see EQUITY vol 16(2) (Reissue) PARA 739 et seq; WILLS vol 50 (2005 Reissue) PARA 445 et seq.

2 As to revocation see PARA 343 et seq post.

3 See the Wills Act 1837 s 23; and WILLS vol 50 (2005 Reissue) PARA 386.

4 *Moor v Raisbeck* (1841) 12 Sim 123; *Blake v Blake* (1880) 15 ChD 481; and see WILLS vol 50 (2005 Reissue) PARA 386.

5 *Cotter v Layer* (1731) 2 P Wms 623. As to aid for defective appointments see PARA 359 post.

6 *Eilbeck v Wood* (1826) 1 Russ 564; *Ford v De Pontès* (1861) 30 Beav 572; *Duguid v Fraser* (1886) 31 ChD 449. See also *Re Walker*, *MacColl v Bruce* [1908] 1 Ch 560.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/308. Change in property.

### 308. Change in property.

Where after the execution of a will exercising a power there is a change in the character of the property subject to the power, the answer to the question whether the subsequent dealing has effected an ademption depends upon whether, upon the true construction of his will, the testator has appointed the property subject to the power, in whatever way invested, or whether he has appointed a specific property and nothing else. The test to be applied is whether his expressed intention is to execute his power, whatever may be the property subject to it at his death, or to give a particular estate his title to dispose of which happens to arise from power and not from property<sup>1</sup>. In this respect there is no distinction between general and special powers<sup>2</sup>.

1 *Gale v Gale* (1856) 21 Beav 349 (see Sugden on Powers (8th Edn) 308); *Collinson v Collinson* (1857) 24 Beav 269; *Cooper v Martin* (1867) 3 Ch App 47; *Re Johnstone's Settlement* (1880) 14 ChD 162; *Blake v Blake* (1880) 15 ChD 481; *Willett v Finlay* (1892) 29 LR Ir 156 (on appeal 29 LR Ir 497, Ir CA); *Re Dowsett*, *Dowsett v Meakin* [1901] 1 Ch 398; *Re Moses*, *Beddington v Beddington* [1902] 1 Ch 100, CA (affd sub nom *Beddington v Baumann* [1903] AC 13, HL); *Re Tottenham*, *Tottenham v Tottenham* [1949] IR 35. Contrast *Re Brazier Creagh's Trusts*, *Holmes v Langley* [1913] 1 IR 232 at 236, where the text to this note was cited with approval by O'Connor MR; but see *Walker v Armstrong* (1856) 21 Beav 284.

2 *Thompson v Simpson* (1881) 50 LJ Ch 461; *Re Dowsett, Dowsett v Meakin* [1901] 1 Ch 398; *Beddington v Baumann* [1903] AC 13, HL.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(i) In general/309. Accession of legal to beneficial interest.

### **309. Accession of legal to beneficial interest.**

The mere accession of the legal to the beneficial interest does not operate as an ademption<sup>1</sup>. Where a specific fund held by trustees for the appointor is appointed, and is received by the appointor who changes the investment, the appointment is adeemed; but this is by reason of the change of investment, not of the transfer by the trustees to the appointor<sup>2</sup>.

1 *Dingwell v Askew* (1788) 1 Cox Eq Cas 427; *Lawrence v Wallis* (1788) 2 Bro CC 319; *Clough v Clough* (1834) 3 My & K 296; *Lee v Lee* (1858) 6 WR 846.

2 *Lee v Lee* (1858) 6 WR 846; *Jones v Southall (No 2)* (1862) 32 Beav 31.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/310. Statutory provision.

## **(ii) General Powers**

### **310. Statutory provision.**

A general devise of the testator's real estate or of his real estate in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and a bequest of his personal estate, or any bequest of personal property described in a general manner<sup>1</sup>, operates, unless a contrary intention appears by the will<sup>2</sup>, as an execution of any general power<sup>3</sup> of appointment<sup>4</sup> capable of being exercised by will<sup>5</sup>, even though such power is contingent<sup>6</sup>. But realty subject to a general power will not pass under a general bequest; nor will personalty subject to a general power pass under a general devise<sup>7</sup>.

A gift which according to the law of the testator's domicile amounts to a general bequest of personal property operates as an execution of a general power of appointment by will, unless a contrary intention appears<sup>8</sup>.

1 *Re Wilkinson's Settlement Trusts* (1869) LR 8 Eq 487; affd 4 Ch App 587. See also *Re Greaves' Settlement Trusts* (1883) 23 ChD 313 at 318; *Re Doherty-Waterhouse, Musgrave v De Chair* [1918] 2 Ch 269.

2 See PARA 314 post. Contrast *Re Rooke, Rooke v Rooke* [1953] Ch 716, [1953] 2 All ER 110, where there was a contrary intention with the Law of Property Act 1925 s 25 (repealed).

3 *Re Williams, Foulkes v Williams* (1889) 42 ChD 93, CA. The Wills Act 1837 s 27 does not apply to a special power: see PARA 318 note 3 post. As to the distinction between general and special powers see PARA 206 ante.

4 Wills Act 1837 s 27; and see *Lake v Currie* (1852) 2 De GM & G 536 at 547 per Lord St Leonards LC; *Re Wilkinson* (1869) 4 Ch App 587 at 590 per Selwyn LJ; *Re Wernher, Wernher v Beit* [1918] 2 Ch 82, CA (general testamentary power of appointment exercised by soldier who is a minor); *Re Doherty-Waterhouse, Musgrave v De Chair* [1918] 2 Ch 269 at 272 per Sargant J. See also EXECUTORS AND ADMINISTRATORS. The Wills Act 1837 s 27 applies to wills of married women: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 209.

5 *Lefevre v Freeland* (1857) 24 Beav 403; *Re Powell's Trusts* (1869) 39 LJ Ch 188. Contrast *Re Barnett, Dawes v Ixer* [1908] 1 Ch 402, where an appointment by document was intended to be a will, but was held not to be.

6 *Thomas v Jones* (1862) 2 John & H 475 (power given to survivor of testator and another). Consider also *Re Magan* [1922] 2 IR 208 n.

7 *Clifford v Clifford* (1852) 9 Hare 675; *Chandler v Pocock* (1880) 15 ChD 491 (affd (1881) 16 ChD 648); *Re Tribe, Tribe v Dean and Chapter of Truro Cathedral* (1915) 85 LJ Ch 79. See also *Re Salvin, Marshall v Wolseley* [1906] 2 Ch 459 at 464. As to the effect of the conversion of property see EQUITY vol 16(2) (Reissue) PARA 701 et seq. See also PARA 230 ante.

8 *Re Simpson, Coutts & Co v Church Missionary Society* [1916] 1 Ch 502 at 510; *Re Wilkinson's Settlement, Butler v Wilkinson* [1917] 1 Ch 620 at 627; *Re Fenston's Settlement, Max-Muller v Simonsen* [1971] 3 All ER 1092, [1971] 1 WLR 1640.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/311. Construction of general gifts.

### 311. Construction of general gifts.

General pecuniary legacies are bequests of personal property described in a general manner, and, subject to any contrary direction, may be paid out of money over which the testator had a general power of appointment to the extent to which his own property is insufficient<sup>1</sup>. A gift of 'stocks, shares and securities' or of 'all stocks, shares and securities which I possess or to which I am entitled'<sup>2</sup> is within the statutory provisions<sup>3</sup>, and so is a gift of 'all my shares' in a certain undertaking<sup>4</sup>. A gift of 'my real estate' or 'my personal estate' is not the less general because the testator uses the word 'my'<sup>5</sup>. So, too, the appointment of a residuary legatee, without any words of gift, is equivalent to a general residuary bequest and consequently has the same operation as such a bequest<sup>6</sup> under those provisions. Again, the appointment of an executor, coupled with the gift of pecuniary legacies, operates as an appointment of a fund which is the subject of a general power of appointment to the extent of the amount required for the payment of the legacies<sup>7</sup>, and also of the debts which must be discharged before the legacies can be paid<sup>8</sup>, and a direction for the payment of the debts, without more, is also sufficient<sup>9</sup>. However, it has not yet been decided that an appointment of an executor, without more, would make the fund assets for all purposes<sup>10</sup>.

1 *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Hurlstone v Ashton* (1865) 11 Jur NS 725; *Wilday v Barnett* (1868) LR 6 Eq 193; *Re Wilkinson's Settlement Trusts* (1869) LR 8 Eq 487 (affd 4 Ch App 587); *Re Davies' Trusts* (1871) LR 13 Eq 163 at 166; *Re Seabrook, Gray v Baddeley* [1911] 1 Ch 151. See also PARAS 276 ante, 316 post.

2 *Frankcombe v Hayward* (1845) 9 Jur 344; *Turner v Turner* (1852) 21 LJ Ch 843; *Re Jacob, Mortimer v Mortimer* [1907] 1 Ch 445.

3 I.e. the Wills Act 1837 s 27: see PARA 310 ante.

4 *Re Doherty-Waterhouse, Musgrave v De Chair* [1918] 2 Ch 269.

5 *Chandler v Pocock* (1880) 15 ChD 491 (affd (1881) 16 ChD 648); *Freme v Clement* (1881) 18 ChD 499 (but see *Holyland v Lewin* (1884) 26 ChD 266, CA); *Frankcombe v Hayward* (1845) 9 Jur 344.

6 *Re Spooner's Trust* (1851) 2 Sim NS 129; *Hawthorn v Shedden* (1856) 3 Sm & G 293 at 304. The appointment of a 'residuary legatee' may even be tantamount to a residuary devise, if aided by the context: see *Singleton v Tomlinson* (1878) 3 App Cas 404 at 418, HL, per Lord Cairns LC. Contrast *Re Fetherstonhaugh-Whitney's Estate* [1924] 1 IR 153 at 160; and see WILLS vol 50 (2005 Reissue) PARA 589.

7 *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Re Davies' Trusts* (1871) LR 13 Eq 163 at 166 per Wickens V-C; *Re Seabrook, Gray v Baddeley* [1911] 1 Ch 151; see also *Re Guedalla, Lee v Guedalla's Trustee* [1905] 2 Ch 331; and PARAS 276 ante, 316 post.



8 *Re Seabrook, Gray v Baddeley* [1911] 1 Ch 151.

9 *Laing v Cowan* (1857) 24 Beav 112; *Re Davies' Trusts* (1871) LR 13 Eq 163.

10 'And so to hold would appear to give a very unnatural construction to the section': *Re Davies' Trusts* (1871) LR 13 Eq 163 at 166 per Wickens V-C. See also *Re Thurston, Thurston v Evans* (1886) 32 ChD 508 at 511 per Chitty J. Contrast *Hawthorn v Shedden* (1856) 3 Sm & G 293 at 304-305 per Stuart V-C; *Re Pinède's Settlement* (1879) 12 ChD 667 at 674 per Jessel MR. See further PARA 317 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/312. General bequest of sums charged on land.

### 312. General bequest of sums charged on land.

A general bequest operates as an appointment under a power to appoint a sum charged on land, even if the will also contains an appointment, under another power, of the land upon which the money is secured<sup>1</sup>. The statutory provisions<sup>2</sup> presuppose the existence of some property which is subject to a general power of appointment, and which, although not the testator's, is in his uncontrolled disposition; they do not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion pro tanto of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it<sup>3</sup>.

On the other hand, where the creation of the charge is effected by the same instrument which confers power to appoint the amount charged, the charge is already in existence when the power comes to be exercised, and a general bequest within the provisions is an effectual appointment<sup>4</sup>.

1 *Clifford v Clifford* (1852) 9 Hare 675. Contrast *Farmer v Bradford* (1827) 3 Russ 354. See also *Maddison v Andrew* (1747) 1 Ves Sen 57 at 60.

2 The Wills Act 1837 s 27, as to which see PARA 310 ante.

3 *Re Wallinger's Estate* [1898] 1 IR 139 at 148, Ir CA, per Fitzgibbon LJ ('It is not enough to show an intention to appoint, an intention to charge ought also to be shown'); *Re Salvin, Marshall v Wolseley* [1906] 2 Ch 459 at 464 per Buckley LJ ('I am unable to find [in the section] any words which provide that, where there is a power to charge upon real estate a sum which when charged will be personal estate, general words of gift are to be construed as effecting, first, the creation of the personal estate by charging it on the real estate, and, secondly, the bequest of the personal estate thus created'). Contrast *Pomfret v Perring* (1854) 5 De GM & G 775.

4 *Re Jones, Greene v Gordon* (1886) 34 ChD 65. The same result follows where the power is an overriding one to appoint mixed realty and personalty: *Re Wilkinson, Thomas v Wilkinson* [1910] 2 Ch 216.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/313. Exceptions to statutory provision.

### 313. Exceptions to statutory provision.

The statutory provisions<sup>1</sup> do not apply in the case of general powers exercised by wills made before 1 January 1838 and not republished after that date<sup>2</sup>, or exercised by wills not containing any general devise or bequest, or, possibly, where the terms of the power require that express reference be made to it<sup>3</sup>. In these cases an affirmative intention on the part of the appointor is

required, although slight indications suffice. Thus a general testamentary power which has to be exercised by a will which 'expressly purports to exercise such power' is validly exercised by a residuary bequest of personal estate over which the testator has 'any disposing power'<sup>4</sup>. Again, a general devise or bequest does not operate as an exercise of a power vested in a testator to revoke existing trusts<sup>5</sup> and appoint on other trusts, except, it seems, where the gift would otherwise be inoperative<sup>6</sup>.

1    le the Wills Act 1837 s 27: see PARA 310 ante.

2    See *ibid* s 34.

3    *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co Ltd v Parker* [1957] Ch 441 at 454, [1957] 2 All ER 252 at 260, CA; *Phillips v Cayley* (1889) 43 ChD 222, CA; *Re Waterhouse, Waterhouse v Ryley* (1907) 77 LJ Ch 30 at 31, CA; *Re Priestley's Will Trusts, Hambros Bank Executor and Trustee Co Ltd v Rabagliati* [1971] Ch 858, [1971] 2 All ER 817, CA, where a general power of appointment conferred on the donee, exercisable by will 'expressly referring to this power as though it were a special power', was held not to be effectually exercised by a residuary gift in the donee's will of 'any property over which I may have a general power of appointment'.

4    *Re Waterhouse, Waterhouse v Ryley* (1907) 77 LJ Ch 30, CA; *Re Rolt, Rolt v Burdett* [1908] WN 76; *Re Lane, Belli v Lane* [1908] 2 Ch 581. Contrast *Campbell's Trustees v Adamson* 1935 SC 894, which was a decision on the meaning of 'expressly bequeathed' in the Entail Amendment (Scotland) Act 1875 s 11 (as amended). The power of a tenant in possession to dispose of property by will must be exercised by specific reference either to the property or to the instrument under which it was acquired or to entailed property generally: Law of Property Act 1925 s 176.

5    The same principle formerly applied in relation to uses.

6    See PARA 344 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/314. Contrary intention.

### 314. Contrary intention.

In order to amount to a contrary intention which will oust the statutory provisions<sup>1</sup>, there must be something in the will inconsistent with the view that the general devise or bequest was meant as an execution of the power<sup>2</sup>. Thus the gift of part of an estate, or of a rentcharge out of it, may fairly be considered as inconsistent with a gift of the whole of it<sup>3</sup>; and, where a general bequest was confined to residue 'not otherwise effectually disposed of', this was held a sufficient contrary intention in respect of property effectually disposed of apart from the will<sup>4</sup>.

However, merely excepting the subject matter of the power from an earlier appointment in the will does not evince a sufficient contrary intention<sup>5</sup>. Nor does the specific exercise of a general testamentary power and the subsequent revocation of this exercise by codicil<sup>6</sup>, or the specific exercise of a power in events which do not in fact occur, or the omission to mention a power which does arise<sup>7</sup>, or the express exercise of only one of two general powers, in respect of the other<sup>8</sup>. Again, it does not suffice if a residuary devise or bequest is confined to property 'which I possess or to which I am entitled'<sup>9</sup>. Nor if it extends to 'all property over which at my death I may have an absolute power of appointment' will these words prevent the statutory provisions from applying to an antecedent bequest<sup>10</sup>. These principles apply even if the power was created by the testator himself, for there is no rule<sup>11</sup> that in such a case there must be an intention by the testator to defeat his own provisions in default of appointment<sup>12</sup>.

1    le the Wills Act 1837 s 27: see PARA 310 ante.

2 *Lake v Currie* (1852) 2 De GM & G 536; *Hutchins v Osborne* (1858) 4 K & J 252 (affd 3 De G & J 142); *Thomas v Jones* (1862) 2 John & H 475; *Scriven v Sandom* (1862) 2 John & H 743 at 744; *Re Priestley's Will Trusts, Hambros Bank Executor and Trustee Co Ltd v Rabagliati* [1971] Ch 858, [1971] 2 All ER 817, CA; and see PARA 313 note 3 ante.

3 *Scriven v Sandom* (1862) 2 John & H 743 at 745. But see *Re Stokes, Public Trustee v Brooks* [1922] 2 Ch 406, where it was held that there was no inconsistency merely because of the duplication of a life interest under an exercise of a special power and a general bequest where the interests were intended to meet different contingencies and the property appointed was not necessarily the same. See also *Re Box's Settlement, Box v Plaut* [1945] 1 All ER 547.

4 *Moss v Harter* (1854) 2 Sm & G 458.

5 *Bernard v Minshull* (1859) John 276. See also *Atherton v Langford* (1857) 25 Beav 5.

6 *Re Jarrett, Re Vrenegroor, Bird v Green* [1919] 1 Ch 366.

7 *Re Spooner's Trusts, ex p Mouritz* (1851) 2 Sim NS 129; *Bush v Cowan* (1863) 32 Beav 228; *Re Elen, Thomas v McKechnie* (1893) 68 LT 816; *Re Andrews, Public Trustee v Vincent* [1922] WN 34. See also *Hickson v Wolfe* (1858) 9 I Ch R 144; *Freme v Clement* (1881) 18 ChD 499 at 512 per Jessel MR.

8 *Re Thirlwell, Evans v Thirlwell* [1958] Ch 146 at 151, [1957] 3 All ER 465 at 468, where it was held that the burden of proving a contrary intention is on those claiming that the power was not exercised.

9 *Re Jacob, Mortimer v Mortimer* [1907] 1 Ch 445.

10 *Re Doherty-Waterhouse, Musgrave v De Chair* [1918] 2 Ch 269. See also *Re Waite's Settlement Trusts, Westminster Bank Ltd v Brouard* [1958] Ch 100, [1957] 1 All ER 629; but see *Re Khan's Settlement, Coutts & Co v Senior Dowager Begum of Bhopal* [1966] Ch 567, [1966] 1 All ER 160 (where the domiciliary law contained restrictions on testamentary freedom which affected the appointed fund).

11 See Sugden on Powers (8th Edn) 305-306.

12 *Re Clark's Estate, Maddick v Marks* (1880) 14 ChD 422; *Boyes v Cook* (1880) 14 ChD 53, CA; *Airey v Bower* (1887) 12 App Cas 263, HL. See also dicta in *Re Wallinger's Estate* [1898] 1 IR 139, Ir CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/315. Will before creation of power.

### 315. Will before creation of power.

A general devise or bequest will exercise a general power to appoint by will even if the will was made before the power was created<sup>1</sup>, and even if the language of the power points to a future execution<sup>2</sup>. However, a power created by will lapses unless the donee survives the testator, even if in his will the donee refers to the power and purports to exercise it<sup>3</sup>.

1 *Meredyth v Meredyth* (1871) IR 5 Eq 565; *Boyes v Cook* (1880) 14 ChD 53, CA (disapproving *Re Ruding's Settlement* (1872) LR 14 Eq 266). See also *Carte v Carte* (1744) 3 Atk 174; *Stillman v Weedon* (1848) 16 Sim 26; *Lake v Currie* (1852) 2 De GM & G 536; *Cofield v Pollard* (1857) 3 Jur NS 1203; *Patch v Shore* (1862) 2 Drew & Sm 589; *Thomas v Jones* (1862) 2 John & H 475 (contingent power existing at date of will); *Hodsdon v Dancer* (1868) 16 WR 1101; *Re Hernando, Hernando v Sawtell* (1884) 27 ChD 284; *Re Old's Trusts, Pengelley v Herbert* (1886) 54 LT 677; *Airey v Bower* (1887) 12 App Cas 263, HL; *Re Marsh, Mason v Thorne* (1888) 38 ChD 630. As to exercising a special power by anticipation see *Re Hayes, Turnbull v Hayes* [1900] 2 Ch 332 (affd [1901] 2 Ch 529, CA).

2 *Airey v Bower* (1887) 12 App Cas 263, HL. Contrast *Pettinger v Ambler, Bunn v Pettinger* (1866) LR 1 Eq 510 (two wills; one before power, one after); *Thompson v Simpson* (1881) 50 LJ Ch 461.

3 See PARA 325 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/316. Appointed fund as assets.

### 316. Appointed fund as assets.

An appointee under a power derives title from the instrument creating the power and not from the appointment<sup>1</sup>. Nevertheless, property appointed by will or under a general power, whether exercisable by deed or will, or by will alone, passes to the appointor's legal personal representatives, whether it is personal<sup>2</sup> or real<sup>3</sup>. This includes entailed interests<sup>4</sup> but not foreign property<sup>5</sup>. Property thus passing to the personal representatives is not only primarily liable for the payment of charges on it<sup>6</sup>, but also becomes part of the assets applicable to the payment of the appointor's debts after all his own property has been exhausted<sup>7</sup>. Property passing to the personal representatives of an appointor domiciled abroad<sup>8</sup> under the statutory provisions<sup>9</sup> is subject to the general law of succession of the donor's country of domicile<sup>10</sup>.

If the appointor dies an undischarged bankrupt, the appointed fund is payable to his executors for the benefit of creditors subsequent to the bankruptcy, and is not divisible among the creditors in the bankruptcy as part of his property<sup>11</sup>. Further, if the appointor induces the trustees to pay the fund to him during his lifetime, his creditors may not recover it from the trustees after his death<sup>12</sup>.

1 *Beyfus v Lawley* [1903] AC 411 at 413, HL, per Lord Lindley; *Re Earl of Devon's Settled Estates*, *White v Earl of Devon*, *Re Steer*, *Steer v Dobell* [1896] 2 Ch 562 at 567. But see *Re Marquis of Bath's Settlement*, *Thynne v Stewart* (1914) 111 LT 153 (property appointed by will under a special power may 'pass' under the will). For inheritance tax purposes, a person's estate includes property over which he has a general power of appointment, other than settled property: see the Inheritance Tax Act 1984 s 5(2); and INHERITANCE TAXATION vol 24 (Reissue) PARA 410. For the position of settled property see INHERITANCE TAXATION vol 24 (Reissue) PARA 638; and PARA 207 ante. For the bearing of this rule on perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1090 et seq.

2 *Re Philbrick's Settlement* (1865) 11 Jur NS 558; *Hayes v Oatley* (1872) LR 14 Eq 1; *Re Hoskin's Trusts* (1877) 5 ChD 229 (on appeal 6 ChD 281, CA); *Re Peacock's Settlement*, *Kelcey v Harrison* [1902] 1 Ch 552, where a testamentary power was exercised by a married woman who died before the Married Women's Property Act 1882 came into operation.

3 See the Land Transfer Act 1897 s 1 (as to deaths before 1926); the Administration of Estates Act 1925 s 1 (as to deaths after 1925); and EXECUTORS AND ADMINISTRATORS. The former distinction between legal and equitable assets no longer exists: see ss 32(1), 34 (as amended); and EXECUTORS AND ADMINISTRATORS.

4 See the Law of Property Act 1925 s 176; and EXECUTORS AND ADMINISTRATORS.

5 *Re Bald*, *Bald v Bald* (1897) 66 LJ Ch 524.

6 See the Administration of Estates Act 1925 s 35; and EXECUTORS AND ADMINISTRATORS.

7 *O'Grady v Wilmot* [1916] 2 AC 231, HL; *Beyfus v Lawley* [1903] AC 411, HL. See also *Lassells v Lord Cornwallis* (1704) 2 Vern 465; *Shirley v Lord Ferrers* (1733) 7 Ves 503n; *Holmes v Coghill* (1806) 12 Ves 206; *Williams v Lomas* (1852) 16 Beav 1; *Fleming v Buchanan* (1853) 3 De GM & G 976; *Re Hodgson*, *Darley v Hodgson* [1899] 1 Ch 666 at 670; and see EXECUTORS AND ADMINISTRATORS.

8 See *Re Fenston's Settlement*, *Max-Muller v Simonsen* [1971] 3 All ER 1092, [1971] 1 WLR 1640.

9 See the Wills Act 1837 s 27: see PARA 310 ante.

10 *Re Pryce*, *Lawford v Pryce* [1911] 2 Ch 286, CA; *Re Khan's Settlement*, *Coutts & Co v Senior Dowager Begum of Bhopal* [1966] Ch 567, [1966] 1 All ER 160; *Re Fenston's Settlement*, *Max-Muller v Simonsen* [1971] 3 All ER 1092, [1971] 1 WLR 1640. Contrast *Re Waite's Settlement Trusts*, *Westminster Bank Ltd v Brouard* [1958] Ch 100, [1957] 1 All ER 629.

11 *Re Guedalla, Lee v Guedalla's Trustee* [1905] 2 Ch 331; *Re Benzon, Bower v Chetwynd* [1914] 2 Ch 68, CA. See also *Lord Townshend v Windham* (1750) 2 Ves Sen 1 at 10; *Jenney v Andrews* (1822) 6 Madd 264; Sugden on Powers (8th Edn) 652.

12 *Re Newnham's Estate, Amooore v Elmslie* [1881] WN 69; cited in *Re Lawley, Zaiser v Lawley* [1902] 2 Ch 799 at 806, CA, per Stirling LJ (affd sub nom *Beyfus v Lawley* [1903] AC 411, HL).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(ii) General Powers/317. Ineffectual appointment.

### 317. Ineffectual appointment.

Where an appointment under a general testamentary power is ineffectual, the property concerned, whether real or personal<sup>1</sup>, devolves either as part of the testator's estate or as property left over in default of appointment, according to the testator's intention<sup>2</sup>. It is not always easy to ascertain what his intention is. Thus a testator shows an intention to make the property his own for all purposes by giving it to his executors or trustees<sup>3</sup>, or by dealing with the settled property and his other property as one mass, without making the appointment either to executors or trustees or to any individual object<sup>4</sup>. This rule applies to an appointment to trustees where no trusts are declared, or where the trusts declared do not exhaust the fund<sup>5</sup>. However, this intention is not shown where the donee of a general power makes a will dealing only with the settled property<sup>6</sup>, or expressly distinguishes between his own and the settled property<sup>7</sup>, or appoints to a person who predeceases him<sup>8</sup>. An express direction to pay debts, coupled with the appointment of an executor, takes the fund from persons entitled in default of appointment only so far as it is required to pay debts<sup>9</sup>.

1 *Re Van Hagan, Sperling v Rochfort* (1880) 16 ChD 18, CA. See also *Willoughby Osborne v Holyoake* (1882) 22 ChD 238; *Coxen v Rowland* [1894] 1 Ch 406.

2 *Re De Lusi's Trusts* (1879) 3 LR Ir 232, where it was said that the question 'is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed'; *Re Pinède's Settlement* (1879) 12 ChD 667; *Re Elen, Thomas v McKechnie* [1893] WN 90; *Re Boyd, Kelly v Boyd* [1897] 2 Ch 232; *Re Hodgson, Darley v Hodgson* [1899] 1 Ch 666.

3 *Chamberlain v Hutchinson* (1856) 22 Beav 444; *Lefevre v Freeland* (1857) 24 Beav 403; *Brickenden v Williams* (1869) LR 7 Eq 310; *Wilkinson v Schneider* (1870) LR 9 Eq 423; *Re Van Hagan, Sperling v Rochfort* (1880) 16 ChD 18, CA. See also *Re Scott, Scott v Hanbury* [1891] 1 Ch 298 (general power exercised by marriage settlement); *Re Keown's Estate* (1867) IR 1 Eq 372; *Blight v Hartnoll* (1883) 23 ChD 218, CA; *Scriven v Sandom* (1862) 2 John & H 743. See also PARA 276 ante.

4 *Re Pinède's Settlement* (1879) 12 ChD 667; *Re Ickeringill's Estate, Hinsley v Ickeringill* (1881) 17 ChD 151; *Willoughby Osborne v Holyoake* (1882) 22 ChD 238; *Re Horton, Horton v Perks, Horton v Clark* (1884) 51 LT 420; *Coxen v Rowland* [1894] 1 Ch 406; *Re Marten, Shaw v Marten* [1902] 1 Ch 314, CA; *Re Vander Byl, Fladgate v Gore* [1931] 1 Ch 216.

5 *Goodere v Lloyd* (1830) 3 Sim 538; *Lefevre v Freeland* (1857) 24 Beav 403.

6 *Re Thurston, Thurston v Evans* (1886) 32 ChD 508; *Bristow v Skirrow* (1870) LR 10 Eq 1.

7 *Re De Lusi's Trusts* (1879) 3 LR Ir 232; *Re Boyd, Kelly v Boyd* [1897] 2 Ch 232; following *Re Davies' Trusts* (1871) LR 13 Eq 163. See also *Re Marten, Shaw v Marten* [1902] 1 Ch 314, CA; *Re Creed, Thomas v Hudson* [1905] WN 94; *Re Doherty-Waterhouse, Musgrave v De Chair* [1918] 2 Ch 269.

8 *Re Davies' Trusts* (1871) LR 13 Eq 163; *Re De Lusi's Trusts* (1879) 3 LR Ir 232; *Re Russell Skinner, Marriott v Ensor* [1924] WN 65.

9 *Laing v Cowan* (1857) 24 Beav 112.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/318. General characteristics.

### (iii) Special and Hybrid Powers

#### 318. General characteristics.

In determining whether or not a special or hybrid power of appointment has been validly exercised by will the questions for the court to decide are: (1) whether there was sufficient intention to exercise the power; and (2) whether the purported exercise complied with the requirements of the power<sup>1</sup>. The burden of proof is upon the party who asserts that the power has been exercised<sup>2</sup>. A mere general devise or bequest does not operate as an execution of a special power<sup>3</sup>. Thus a special power over realty is not exercised by a general devise to persons of whom some are objects<sup>4</sup>, or even to the sole object of the power<sup>5</sup>, notwithstanding that the testator owns no realty.

1 *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418 at 430, [1971] 3 All ER 433 at 442 per Megarry J; and see PARA 324 post. As to the exercise of a power of appointment where settlements of different funds operate as separate settlements see *Re Campbell's Trusts, Public Trustee v Campbell* [1922] 1 Ch 551. The non-exercise of a power in favour of a class may result in a gift to the class as tenants in common: see PARA 209 ante.

2 *Re Mills, Mills v Mills* (1886) 34 ChD 186. See also *Re Ackerley, Chapman v Andrew* [1913] 1 Ch 510 at 514; and PARA 284 ante.

3 The Wills Act 1837 s 27 (see PARA 310 ante) does not apply to special powers: *Re Hayes, Turnbull v Hayes* [1901] 2 Ch 529, CA; *Pidgely v Pidgely* (1844) 1 Coll 255; *Elliott v Elliott* (1846) 15 Sim 321; *Cloves v Awdry* (1850) 12 Beav 604; *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Cronin v Roche* (1858) 8 I Ch R 103; *Russell v Russell* (1861) 12 I Ch R 377; *Re Caplin's Will* (1865) 2 Drew & Sm 527; *Humphery v Humphery* (1877) 36 LT 91; *Cadell v Wilcocks* [1898] P 21.

4 *Re Mills, Mills v Mills* (1886) 34 ChD 186. As to the use of the word 'object' see PARA 209 note 1 ante.

5 *Harvey v Harvey* (1875) 32 LT 141; *Re Williams, Foulkes v Williams* (1889) 43 ChD 93, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/319. Essentials of exercise.

#### 319. Essentials of exercise.

To determine whether a special or a hybrid power has been exercised, the court will look at the whole of the will to see whether there is either: (1) a reference to the power<sup>1</sup>; or (2) a reference to the property subject to the power<sup>2</sup>; or (3) an intention otherwise expressed in the will to exercise the power<sup>3</sup>.

1 See PARA 320 post.

2 See PARA 321 post.

3 See PARA 324 post. See also *Andrews v Emmot* (1788) 2 Bro CC 297; *Hales v Margerum* (1796) 3 Ves 299 at 301; *Langham v Nenny* (1797) 3 Ves 467; *Brodrick v Brown* (1855) 1 K & J 328 at 332 per Wood V-C; *Re Ackerley, Chapman v Andrew* [1913] 1 Ch 510 at 514 per Sargant J.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/320. Reference to power.

### 320. Reference to power.

Any reference to a special power, however slight, is sufficient<sup>1</sup>. Thus an indirect reference to the power<sup>2</sup>, or even a reference to the instrument creating the power, may be enough<sup>3</sup>. The reference must be specific<sup>4</sup>, but if the intention to exercise a special power is clear, an inaccurate or incomplete reference to it may suffice<sup>5</sup>. A reference to a 'beneficial' power may be treated as a sufficient reference to a special power<sup>6</sup>, and real estate held on trust for sale passed under an appointment of personal estate even if the will also contains an appointment of real estate generally<sup>7</sup>. On the other hand, an erroneous recital by a donee of a power that another is entitled to the property subject to the power does not amount to an execution of the power<sup>8</sup>; and if there is a statement, following an appointment to one object of the power, that the donee makes no further appointment as he wishes the fund to pass directly to two other named objects of the power, this does not amount to an appointment by implication to those other named objects<sup>9</sup>.

1 *Re Williams, Foulkes v Williams* (1889) 42 ChD 93 at 97, CA, per Lindley LJ.

2 *Re Comber's Settlement* (1865) 11 Jur NS 968 (where there was a reference in another part of the will); *Harvey v Stracey* (1852) 1 Drew 73; *Disney v Crosse, Eyre v Parker* (1866) LR 2 Eq 592 (where it was held that an appointment to a stranger subject to legacies already given to objects is an appointment of legacies to objects); *Lees v Lees* (1871) IR 5 Eq 549.

3 *Hunloke v Gell* (1830) 1 Russ & M 515; *Peirce v M'Neale* [1894] 1 IR 118.

4 *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co Ltd v Parker* [1957] Ch 441, [1957] 2 All ER 252, CA (where it was held that the expression 'including any property over which I may have any power of disposition' was ineffective to exercise a special power); *Re Slack's Settlement, Re Slack, Butt v Slack* [1923] 2 Ch 359; *Re Walsh's Trusts* (1878) 1 LR Ir 320; and see *Beamish v Beamish* (1869) IR 4 Eq 120. See also *Re Priestley's Will Trusts, Hambros Bank Executors and Trustee Co Ltd v Rabagliati* [1971] Ch 858, [1971] 2 All ER 817, CA; *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418, [1971] 3 All ER 433.

5 *Harvey v Stracey* (1852) 1 Drew 73; *Carver v Richards* (1859) 27 Beav 488 (affd (1860) 1 De GF & J 548); *Re Wilmot* (1861) 29 Beav 644 (reference to power as contained in settlement of 1819 instead of 1839); *Bruce v Bruce* (1871) LR 11 Eq 371 (where there was a reference to the wrong power, the defective execution was aided); *Alexander's Trustees v Alexander's Trustees* 1917 SC 654 (considered in *Re McMorran, Mercantile Bank of India Ltd v Perkins* [1958] Ch 624 at 635, [1958] 1 All ER 186 at 192). Contrast *Re Holford's Settlement, Lloyds Bank Ltd v Holford* [1945] Ch 21, [1944] 2 All ER 462, where there were inconsistencies between the terms of the power and the alleged appointment; *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418, [1971] 3 All ER 433.

6 *Von Brockdorff v Malcolm* (1885) 30 ChD 172. Contrast *Ames v Cadogan* (1879) 12 ChD 868. See also *Re Welford's Will Trusts, Davidson v Davidson* [1946] 1 All ER 23.

7 *Re Irving, Irving v Balden* (1910) 129 LT Jo 572. However, where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property: See the Trusts of Land and Appointment of Trustees Act 1996 s 3(1); and PARA 230 ante.

8 *Pennefather v Pennefather* (1873) IR 7 Eq 300; *L'Estrange v L'Estrange* (1890) 25 LR Ir 399, Ir CA; *Haverty v Curtis* [1895] 1 IR 23. Contrast *Re Enever's Trusts, Power v Power* [1912] 1 IR 511.

9 *Re Jack, Jack v Jack* [1899] 1 Ch 374. To deprive a person of an unappointed fund it must be shown that there has been an actual appointment: *Langslow v Langslow* (1856) 21 Beav 552; *Carver v Richards* (1859) 27 Beav 488 (affd (1860) 1 De GF & J 548). Contrast *Foster v Cautley* (1855) 6 De GM & G 55, where there was held to be an appointment by implication.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/321. Reference to property.

### 321. Reference to property.

Where, in the language of a specific or demonstrative gift, a testator describes and disposes of specific property, being property over which he has a special power, in favour of objects<sup>1</sup>, or of persons of whom some are objects<sup>2</sup>, but without mentioning the power, the inference is that he intended to exercise it, despite any misdescription of the property<sup>3</sup>. This is so even if he makes an indefinite appointment of income under a power to appoint capital<sup>4</sup>, or merely refers to property over which he has a disposing power<sup>5</sup>, or has forgotten or is ignorant of the existence of the power<sup>6</sup>. Again, if part of property subject to a special power is expressly excepted out of a general gift, this shows an intention to exercise the power as to the residue<sup>7</sup>. However, the testator's intention to dispose of the specific property subject to the power must be clear<sup>8</sup>. Thus, despite a reference to property of the kind which is subject to the power, an attempt to dispose of it in an unauthorised manner may rebut any presumed intention to exercise the power<sup>9</sup>. Moreover, a reference to the property may not indicate any intention to exercise more than one of two powers relating to the same property<sup>10</sup>. Again, a gift in general terms of property similar to property which is subject to the power, for example a specific stock<sup>11</sup> or legacies equal to the fund subject to the power<sup>12</sup>, does not sufficiently evidence an intention to exercise the power, nor does a mere reference to the fund without any indication of an intention to dispose of it<sup>13</sup>. So, too, a gift referring to part of the subject of a power, or to some of many subjects, does not show an intention to exercise the power as to the whole<sup>14</sup>; nor does an appointment of an estate generally show an intention to exercise a power of appointing a sum secured by a term on the estate<sup>15</sup>.

1 *Forbes v Ball* (1817) 3 Mer 437; *Elliott v Elliott* (1846) 15 Sim 321; *Davies v Davies* (1858) 4 Jur NS 1291; *Re Davids' Trusts* (1859) John 495; *Re Mackenzie, Thomson v Huddleston* [1917] 2 Ch 58. See also *Innes v Sayer* (1851) 3 Mac & G 606 at 612. As to the use of the word 'object' see PARA 209 note 1 ante.

2 *Re Gratwick's Trusts* (1865) LR 1 Eq 177; *Bruce v Bruce* (1871) LR 11 Eq 371.

3 *Mackinley v Sison* (1837) 8 Sim 561; *Bruce v Bruce* (1871) LR 11 Eq 371.

4 *Tredennick v Tredennick* [1900] 1 IR 354.

5 *Re Welford's Will Trusts, Davidson v Davidson* [1946] 1 All ER 23, where the term 'appoint' was not used.

6 *Carver v Richards* (1859) 27 Beav 488 at 496 per Romilly MR (affd (1860) 1 De GF & J 548); *Minchin v Minchin* (1871) IR 5 Eq 258 at 273, Ir CA, per Christian LJ; *Re Porter's Settlement, Porter v De Quetteville* (1890) 45 ChD 179, CA; and see PARA 322 text and note 4 post. Contrast *Re Slack's Settlement, Re Slack, Butt v Slack* [1923] 2 Ch 359 (words 'if any' negating intention).

7 *Reid v Reid* (1858) 25 Beav 469, where there was a gift by will of all residue except certain specified property, and that property was part of the property subject to a special power, the power was held to have been well exercised as to the residue of the property comprised in it. See also *Walker v Mackie* (1827) 4 Russ 76.

8 *Ward v Hartpole* (1776) 3 Bli 470, HL; *Bennett v Aburrow* (1803) 8 Ves 609; *Re Morgan* (1857) 7 I Ch R 18, PC; *Re Mattingley's Trusts* (1862) 2 John & H 426; *Re Huddleston, Bruno v Eyston* [1894] 3 Ch 595; *Peirce v M'Neale* [1894] 1 IR 118. Contrast *Robinson v Sykes* (1856) 23 Beav 40; *Brookman v Hales* (1813) 2 Ves & B 45; *Carver v Richards* (1859) 27 Beav 488 at 496; *Probert v Morgan and Clifford* (1739) 1 Atk 440; *Re Caswall, ex p Caswall* (1744) 1 Atk 559; *Molton v Hutchinson* (1739) 1 Atk 558; *Bradly v Westcott* (1807) 13 Ves 445; *Dillon v Dillon* (1809) 1 Ball & B 77 at 92; *Byrne v Cullinan* [1904] 1 IR 42, Ir CA; *Re Wright, Hegan v Bloor* [1920] 1 Ch 108 (reference to another fund as the only part of her property which testatrix could leave to other than blood relations).

9 *Wildbore v Gregory* (1871) LR 12 Eq 482; *Re Rickman, Stokes v Rickman* (1899) 80 LT 518.



10 *Re Ackerley, Chapman v Andrew* [1913] 1 Ch 510. See also *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418 at 429, [1971] 3 All ER 433 at 444 per Megarry J.

11 *Webb v Honnor* (1820) 1 Jac & W 352. Contrast *Re Waldron's Settlement, Waldron v Errington-Wales* [1940] 3 All ER 442 (mention of specific shares).

12 *Jones v Tucker* (1817) 2 Mer 533; *Forbes v Ball* (1817) 3 Mer 437; *Lownds v Lownds* (1827) 1 Y & J 445; *Walker v Laxton* (1827) 1 Y & J 557 (a strong case: see *Williams v Hughes* (1857) 24 Beav 474 at 480); *Davies v Thorns* (1849) 3 De G & Sm 347; *Rooke v Rooke* (1862) 2 Drew & Sm 38; contrast *Buxton v Buxton* (1837) 1 Keen 753 (legacies greater than the fund); and *Lowe v Pennington* (1840) 10 LJ Ch 83 (legacies less than the fund).

13 *Garth v Townsend* (1869) LR 7 Eq 220, where there was a reference to the fund but also an expressed intention not to exercise the power; *Re Bringloe's Trusts* (1872) 26 LT 58. Contrast *Davis v Richards & Wallington Industries Ltd* [1991] 2 All ER 563 at 582, [1990] 1 WLR 1511 at 1530 per Scott J, where it was considered that the appointor's intention to make the disposition justified imputing to him an intention to exercise the power, provided an intention not to exercise the power could not be inferred. See also *Wade v Paget* (1784) 1 Bro CC 363; *Cowlshaw v Hardy* (1857) 25 Beav 169; *Mogridge v Clapp* [1892] 3 Ch 382; and *Re Morgan* (1857) 7 I Ch R 18.

14 *Lewis v Lewellyn* (1823) Turn & R 104; *Napier v Napier* (1826) 1 Sim 28; *Hughes v Turner* (1835) 3 My & K 666; *Elliott v Elliott* (1846) 15 Sim 321; *Re Nicholl, Re Perkins, Nicholl v Perkins* (1920) 125 LT 62, doubting *Re Wait, Workman v Petgrave* (1885) 30 ChD 617; *Re Comber's Settlement* (1865) 14 WR 172; *Reid v Reid* (1858) 25 Beav 469; *Walker v Mackie* (1827) 4 Russ 76, as to which see *Hughes v Turner* (1835) supra.

15 *Farmer v Bradford* (1827) 3 Russ 354; *Clifford v Clifford* (1852) 9 Hare 675.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/322. Admissibility of evidence.

### 322. Admissibility of evidence.

If the gift is prima facie specific<sup>1</sup>, evidence as to the testator's property is admissible in order to show whether he intended to exercise his power<sup>2</sup>. Again, where a testator purports to appoint property under a power, evidence may be given of the existence of one power and of the absence of any other<sup>3</sup>. However, evidence that the existence of the power had been forgotten is not admissible<sup>4</sup>. Further, although surrounding circumstances at the time the will was made may be looked at, a settlement creating a power subsequently to the will is not a surrounding circumstance<sup>5</sup>.

1 As to what constitutes a specific gift see *Robertson v Broadbent* (1883) 8 App Cas 812, HL; *Bennett v Aburrow* (1803) 8 Ves 609; *Re Mattingley's Trusts* (1862) 2 John & H 426; and EXECUTORS AND ADMINISTRATORS; WILLS vol 50 (2005 Reissue) PARA 446.

2 *Innes v Sayer* (1851) 3 Mac & G 606; *Walker v Mackie* (1827) 4 Russ 76; *Mackinley v Sison* (1837) 8 Sim 561; *Shuttleworth v Greaves* (1838) 4 My & Cr 35 at 38; *Elliott v Elliott* (1846) 15 Sim 321; *Horwood v Griffith* (1853) 4 De GM & G 700 at 708; *Re Morgan* (1857) 7 I Ch R 18, PC; *Rooke v Rooke* (1862) 2 Drew & Sm 38; *Re Gratwick's Trusts* (1865) LR 1 Eq 177; *Re Williams, Foulkes v Williams* (1889) 42 ChD 93, CA; *Re Mills, Mills v Mills* (1886) 34 ChD 186; *Tredennick v Tredennick* [1900] 1 IR 354; *Re Hayes, Turnbull v Hayes* [1901] 2 Ch 529, CA; *Re Brazier Creagh's Trusts, Holmes v Langley* [1913] 1 IR 232.

3 *Re Mayhew, Spencer v Cutbush* [1901] 1 Ch 677; *Re Milner, Bray v Milner* [1899] 1 Ch 563; *Re Mackenzie, Thornton v Huddleston* [1917] 2 Ch 58; *Re Barker's Settlement, Knocker v Vernon Jones* [1920] 1 Ch 527 (power of revocation and new appointment). See also PARA 343 et seq post.

4 *Re Boyd, Nield v Boyd* (1890) 63 LT 92.

5 *Boyes v Cook* (1880) 14 ChD 53, CA. The instrument creating the power, although subsequent to the alleged execution, may, of course, be referred to for the purpose of ascertaining whether its requirements are satisfied by the previous instrument: *Pettinger v Ambler, Bunn v Pettinger* (1866) LR 1 Eq 510.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/323. Where appointor has an interest in the appointed property.

### **323. Where appointor has an interest in the appointed property.**

If the testator possesses property of his own answering the description in his will, the usual inference is that he did not intend to exercise the power<sup>1</sup>. Moreover, if a man has both a power and an interest, and does an act generally as owner of the land without reference to the power, the land passes by virtue of his ownership, not of his power. However, where the disposition of land will be absolutely void if it does not enure as an execution of the power, effect will be given to it by so construing it<sup>2</sup>. If he both grants his estate and exercises his power, the estate passes in the manner best adapted to carry out the intention of the parties<sup>3</sup>. Further, if he either grants his estate or exercises his power, and full effect will not in this way be given to that intention, the estate will be held to pass in the manner not expressed to be intended, in order to put into effect the general intention<sup>4</sup>. No oral evidence of an intention not to exercise the power is admissible<sup>5</sup>. Again, if the power is executed but proves to have been previously destroyed or to have been in its inception badly created, the donee's interest will make good the default in appointment<sup>6</sup>.

1 *Noel v Noel* (1859) 4 Drew 624; *Re Waldron's Settlement, Waldron v Errington-Wales* [1940] 3 All ER 442 (preferring both *Napier v Napier* (1826) 1 Sim 28; *Lewis v Lewellyn* (1823) Turn & R 104 to *Re Wait, Workman v Petgrave* (1885) 30 ChD 617); *Re Tottenham, Tottenham v Tottenham* [1949] IR 35.

2 *Clere's Case* (1600) 6 Co Rep 17b; *Dowager Countess of Roscommon v Fowke* (1745) 6 Bro Parl Cas 158, HL; *Maundrell v Maundrell* (1802) 7 Ves 567 (affd (1805) 10 Ves 246 at 257); *Blake v Marnell* (1811) 2 Ball & B 35; *Re Bidwell's Settlement Trusts* (1862) 32 LJ Ch 71; *Re Pennant's Will Trusts, Pennant v Ryland* [1970] Ch 75, [1969] 2 All ER 862.

3 *Cox v Chamberlain* (1799) 4 Ves 631; *Re Griffiths' Settlement, Griffiths v Waghorne* [1911] 1 Ch 246. Contrast *Mogridge v Clapp* [1892] 3 Ch 382 at 395, CA, per Lindley LJ; but see *Roach v Wadham* (1805) 6 East 289 (see Sugden on Powers (8th Edn) 359); *Child v Douglas* (1856) 2 Jur NS 950; *Spoor v Green* (1874) LR 9 Exch 99; *Re Pennant's Will Trusts, Pennant v Ryland* [1970] Ch 75, [1969] 2 All ER 862.

4 *Parker v Kett* (1701) 1 Ld Raym 658 at 660; *Tomlinson v Dighton* (1712) 1 P Wms 149; *Langley v Brown* (1741) 2 Atk 195 at 199; *Campbell v Leach* (1775) Amb 740; *Wade v Paget* (1784) 1 Bro CC 363 at 366 (see Sugden on Powers (8th Edn) 348); *Andrews v Emmot* (1788) 2 Bro CC 297 at 303; *A-G v Griffith* (1807) 13 Ves 565 at 580; *Wynne v Griffith* (1826) 1 Russ 283; *Doe d Daniel v Keir* (1829) 4 Man & Ry KB 101.

5 *Countess Dowager of Coventry v Earl of Coventry* (1724) 2 P Wms 222; *Shove v Pincke* (1793) 5 Term Rep 124, 310; *Blake v Marnell* (1811) 2 Ball & B 35; *MacAndrew v Gallagher* (1874) IR 8 Eq 490.

6 *Cross v Hudson* (1789) 3 Bro CC 30; *Mortlock v Buller* (1804) 10 Ves 292 at 314; *Mandeville v Roe* (1844) 1 Jo & Lat 371; *Jones v Southall* (1861) 30 Beav 187; *Sing v Leslie* (1864) 2 Hem & M 68 at 86.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/324. Intention to exercise power.

### **324. Intention to exercise power.**

If the intention of a testator to exercise a special power is not expressed, it can be inferred only from the words of his will and the circumstances at the time of executing it which were known to him, and to which the court, putting itself in his place, is bound to have regard<sup>1</sup>. Each of these circumstances, although not in itself conclusive, may indicate an intention to execute the

power. Two matters must be gathered from the construction of the will, namely that the testator had the power in mind at the time of making his will and that he wished to exercise it<sup>2</sup>. An intention to exercise a power is not usually implied if there is a gift over in default of appointment<sup>3</sup>.

1 *Re Mills, Mills v Mills* (1886) 34 ChD 186; *Re Williams, Foulkes v Williams* (1889) 42 ChD 93, CA; *Re Mackenzie, Thornton v Huddleston* [1917] 2 Ch 58; *Re Edmonstone, Bevan v Edmonstone* (1901) 49 WR 555 at 556. See to the contrary *Re Morgan* (1857) 7 I Ch R 18, PC. See also PARA 318 ante.

2 *Wrigley v Lowndes* [1908] P 348.

3 *Henderson v Constable* (1842) 5 Beav 297.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/325. Execution before creation.

### 325. Execution before creation.

It requires a very clear indication in the language of a will to manifest an intention to exercise a special power which was not in existence at the date of the will<sup>1</sup>. Further, the statutory provision<sup>2</sup> that, with reference to the property comprised in it, a will is construed to speak from death has no application to limited powers created after the date of the will, because the property appointed can hardly be said to be 'comprised in' the will<sup>3</sup>. But the statutory provision appears to apply to accretions to a fund subject to an existing power<sup>4</sup>. Moreover, an individual may execute only the powers given to him during his lifetime; he may not execute a power given by the will of a person who survives him<sup>5</sup>.

1 *Re Hayes, Turnbull v Hayes* [1901] 2 Ch 529, CA (not following *Stillman v Weedon* (1848) 16 Sim 26); *Cave v Cave* (1856) 8 De GM & G 131; *Re Wells' Trusts, Hardisty v Wells* (1889) 42 ChD 646; *Re Bower, Bower v Mercer* [1930] 2 Ch 82, where it was held that a reference in a will to 'future powers' enabled the testatrix to exercise a power created after her will was executed but before she executed a confirming codicil, whereas powers created after the codicil were excluded. As to the legal possibility of executing a non-existent special power by anticipation see also *Hope v Hope* (1854) 5 Giff 13; *Walker v Armstrong* (1856) 21 Beav 284 at 305 (on appeal 8 De GM & G 531).

2 *the Wills Act 1837 s 24*: see WILLS vol 50 (2005 Reissue) PARA 573. As to general powers see PARA 315 ante.

3 *Re Bower, Bower v Mercer* [1930] 2 ChD 82 (cited in note 1 supra); *Re Wells' Trusts, Hardisty v Wells* (1889) 42 ChD 646; *Doyle v Coyle* [1895] 1 IR 205; *Re Hayes, Turnbull v Hayes* [1901] 2 Ch 529, CA.

4 *Re Paul's Settlement Trusts, Paul v Nelson* [1920] 1 Ch 99 at 105, where it was held that there was not a new power but merely an accretion to a fund subject to an existing power.

5 *Jones v Southall (No 2)* (1862) 32 Beav 31; *Sharpe v M'Call* [1903] 1 IR 179; *Re Young, Public Trustee v Walker* [1920] 2 Ch 427; *Re Baker, Steadman v Dicksee* [1934] WN 94, CA; *Penny's Trustees v Penny's Trustees* 1925 SC 175. It is not certain where the Wills Act 1837 s 33 (substituted by the Administration of Justice Act 1982 s 19) applies: see WILLS vol 50 (2005 Reissue) PARA 460; and *Griggs v Gibson (No 2)* (1866) 35 LJ Ch 458. See also WILLS vol 50 (2005 Reissue) PARAS 466-467.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/326. Partial exercise.

### 326. Partial exercise.

A will containing an express but partial exercise of a special power and a residuary gift which is prima facie applicable only to the testator's property does not operate as an appointment of the balance of the property subject to the power<sup>1</sup> unless such an intention can be implied<sup>2</sup>.

1 *Hughes v Turner* (1835) 3 My & K 666; *Butler v Gray* (1869) 5 Ch App 26; *Re Nicholl, Re Perkins, Nicholl v Perkins* (1920) 125 LT 62; dissenting from *Re Wait, Workman v Petgrave* (1885) 30 ChD 617.

2 *Davies v Fisher* (1842) 5 Beav 201; *Elliott v Elliott* (1846) 15 Sim 321; *Harvey v Stracey* (1852) 1 Drew 73; *Price v Price* (1882) 46 LT 228.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/327. Universal and residuary gifts.

### 327. Universal and residuary gifts.

Where a testator states 'I wish, at my death, to leave everything I have power to will' to an object of the power, it usually indicates an intention to exercise a special power<sup>1</sup>, particularly where the testator has no other power<sup>2</sup>. This is so even where the bequest includes the testator's own property<sup>3</sup> or he purports to create interests in excess of the power, such as an absolute interest in lieu of a life interest<sup>4</sup>. A residuary gift to persons who are objects of a special power may operate as an appointment to them of a fund wrongly appointed to a person who is not an object<sup>5</sup>. It is otherwise if the residue is subjected to the payment of debts<sup>6</sup>.

1 *Wrigley v Lowndes* [1908] P 348. See also *Bailey v Lloyd* (1829) 5 Russ 330 (but see Sugden on Powers (8th Edn) 295); *Banks v Banks* (1853) 17 Beav 352; *Ferrier v Jay* (1870) LR 10 Eq 550; *Gainsford v Dunn* (1874) LR 17 Eq 405; *Thornton v Thornton* (1875) LR 20 Eq 599; *Re Swinburne, Swinburne v Pitt* (1884) 27 ChD 696, where part of the property which was subject to the power was purported to be given to persons who were not objects of the power; *Re Blackburn, Smiles v Blackburn* (1889) 43 ChD 75; *Re Boyd, Nield v Boyd* (1890) 63 LT 92 (attempt to create illegal interests). Contrast *Re Harris Trusts* (1872) 20 WR 742; *Re Hunt's Trusts* (1885) 31 ChD 308; and distinguish *Hope v Hope* (1854) 5 Giff 13, where the will was not sufficiently precise and definite.

2 See *Re Richardson's Trusts* (1886) 17 LR Ir 436; *Re Milner, Bray v Milner* [1899] 1 Ch 563; *Re Mayhew, Spencer v Cutbush* [1901] 1 Ch 677; *Re Welford's Will Trusts, Davidson v Davidson* [1946] 1 All ER 23.

3 *Byrne v Cullinan* [1904] 1 IR 42, Ir CA. See also *Reid v Nuttgens* [1960] IR 360.

4 *Re Teape's Trusts* (1873) LR 16 Eq 442. See also *Re Mackenzie, Thornton v Huddleston* [1917] 2 Ch 58.

5 *Re Hunt's Trusts* (1885) 31 ChD 308.

6 *Clogstoun v Walcott* (1843) 13 Sim 523; *Re Cotton, Wood v Cotton* (1888) 40 ChD 41; *Re Porter's Settlement, Porter v de Quetteville* (1890) 45 ChD 179, CA. Contrast *Doe d Hellings v Bird* (1809) 11 East 49; *Price v Price* (1882) 46 LT 228; *Re Swinburne, Swinburne v Pitt* (1884) 27 ChD 696.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/328. Co-existing powers.

### 328. Co-existing powers.

The fact that a testator possesses a general as well as a special power does not of itself prevent a general reference to powers from being sufficient to exercise a special power, although it may be taken into consideration in arriving at the testator's intention<sup>1</sup>. Again, where the donee has more than one power, the exercise of one will not, without more, show an

intention to exercise the rest<sup>2</sup>. However, where the intention to pass the property is clear, the power by which alone it can pass is held to have been executed even though another is referred to, as the mere indication that it is to pass in a particular manner does not control the general intention that it is to pass in any event<sup>3</sup>, although in this case the words must be sufficient to amount to an execution of the first power<sup>4</sup>. Further, if a recital erroneously states that an object of the power is entitled to the subject matter so as to suggest that he is so entitled by independent title, this negatives any exercise of the power. It is otherwise if the assumed independent title is one which the donee of the power wrongly supposes himself to have conferred<sup>5</sup>.

1 *Ferrier v Jay* (1870) LR 10 Eq 550, where a special power was held to have been exercised; *Thornton v Thornton* (1875) LR 20 Eq 599, where special and general powers were held to have been exercised by general words; *Re Rickman, Stokes v Rickman* (1899) 80 LT 518, where a special power was held not to have been exercised; *Re Ackerley, Chapman v Andrew* [1913] 1 Ch 510. See also *Re Porter's Settlement, Porter v de Quetteville* (1890) 45 ChD 179, CA (two special powers); *Re Milner, Bray v Milner* [1899] 1 Ch 563; *Re Sharland, Re Rew, Rew v Wippell* [1899] 2 Ch 536; *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418, [1971] 3 All ER 433.

2 *A-G v Vigor* (1803) 8 Ves 256; *Trollope v Linton* (1823) 1 Sim & St 477; *Saward v M'Donnell* (1848) 2 HL Cas 88; *Cooke v Cunliffe* (1851) 17 QB 245; *Maunsell v Maunsell* (1871) 19 WR 1003; *Saunders v Carden* (1891) 27 LR Ir 43. See also PARA 322 ante.

3 *Ward v Hartpole* (1776) 3 Bli 470, HL; *Re Morgan* (1857) 7 I Ch R 18, PC.

4 *A-G v Vigor* (1803) 8 Ves 256; *Hamilton v Royse* (1804) 2 Sch & Lef 315 at 331, HL; *Re Wilmot* (1861) 29 Beav 644; *Bruce v Bruce* (1871) LR 11 Eq 371. See also *Re Denton, Bannerman v Toosey* (1890) 63 LT 105; *Re Flower, Matheson v Goodwyn* (1890) 63 LT 201, CA.

5 *Minchin v Minchin* (1871) IR 5 Eq 178 (on appeal IR 5 Eq 258, Ir CA); *Lees v Lees* (1871) IR 5 Eq 549; *Morgan v Gronow* (1873) LR 16 Eq 1; *Pennefather v Pennefather* (1873) IR 7 Eq 300 at 310 per Lord O'Hagan LC; *Re Walsh's Trusts* (1878) 1 LR Ir 320; *L'Estrange v L'Estrange* (1890) 25 LR Ir 399, Ir CA. As to the parallel cases on erroneous recitals of direct gifts by will see WILLS vol 50 (2005 Reissue) PARA 543. See also *Re Sugden's Trusts, Sugden v Walker* [1917] 2 Ch 92, CA (effect of recital limited).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/329. Use of 'appoint'.

### 329. Use of 'appoint'.

Where the word 'appoint' is used, an intention may be gathered that the testator means to exercise a special power<sup>1</sup>, especially if he has no general power<sup>2</sup>. This may be so even if he names non-objects in a substitutional appointment<sup>3</sup>, or gives a life interest to a non-object with remainder to objects<sup>4</sup>. Extrinsic evidence is admissible where the word 'appoint' is used to show that the testator possessed no other power of appointment at his death<sup>5</sup>.

1 *Pidgely v Pidgely* (1844) 1 Coll 255; *Re Milner, Bray v Milner* [1899] 1 Ch 563; *Re Mayhew, Spencer v Cutbush* [1901] 1 Ch 677; *Kent v Kent* [1902] P 108. Contrast the following cases where special powers were not exercised by general words: *Cooke v Cunliffe* (1851) 17 QB 245; *Re Cotton, Wood v Cotton* (1888) 40 ChD 41; *Sykes v Carroll* [1903] 1 IR 17; *Re Weston's Settlement, Neeves v Weston* [1906] 2 Ch 620; *Re Sanderson, Sanderson v Sanderson* (1912) 106 LT 26; *Re Beresford's Will Trusts, Sturges v Beresford* [1938] 3 All ER 566. See also *Re Holford's Settlement, Lloyds Bank Ltd v Holford* [1945] Ch 21, [1944] 2 All ER 462, where the cases are reviewed; and *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418, [1971] 3 All ER 433 (hybrid power).

2 *Re Richardson's Trusts* (1886) 17 LR Ir 436.

3 *Re Latta's Marriage Settlement Trusts, Public Trustee v Latta* [1949] Ch 490, [1949] 1 All ER 665; following *Re Mayhew, Spencer v Cutbush* [1901] 1 Ch 677; *Re Swinburne, Swinburne v Pitt* (1884) 27 ChD 696.

4 *Re Loughhead, Hamilton v Loughhead* [1918] 1 IR 227.

5 *Re Mayhew, Spencer v Cutbush* [1901] 1 Ch 677. See also *Re Huddleston, Bruno v Eyston* [1894] 3 Ch 595.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/330. Direction to pay debts.

### 330. Direction to pay debts.

A direction to pay debts and general and testamentary expenses out of a fund which necessarily includes the fund subject to the special power is not in itself sufficient to negative a presumption of an intention to exercise the power which is otherwise established<sup>1</sup>, as the rule *reddendo singula singulis* may be applied<sup>2</sup>.

1 *Cowx v Foster* (1860) 1 John & H 30; *Re Teape's Trusts* (1873) LR 16 Eq 442; *Re Swinburne, Swinburne v Pitt* (1884) 27 ChD 696; *Re Milner, Bray v Milner* [1899] 1 Ch 563. To the contrary see *Clogstoun v Walcott* (1843) 13 Sim 523; *Re Mackenzie, Thornton v Huddleston* [1917] 2 Ch 58; *Re Welford's Will Trusts, Davidson v Davidson* [1946] 1 All ER 23.

2 See *Re Welford's Will Trusts, Davidson v Davidson* [1946] 1 All ER 23 at 26. This rule of construction provides that, where the context so requires, distinct matters in a document are to be assigned distributively to distinct matters, so that particular phrases are read so as to relate to their particular objects.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(3) EXERCISE BY WILL/(iii) Special and Hybrid Powers/331. Power of revocation.

### 331. Power of revocation.

Where a person has a special power of appointment and also a power of revocation and new appointment, an appointment expressed in general words does not extend to property which the appointor cannot appoint without the exercise of the power of revocation, if there is other property to which the appointment can apply<sup>1</sup>. Similarly, a will exercising a special power which is afterwards exercised by a deed reserving a power of revocation does not affect property appointed by the deed<sup>2</sup>. Where a power of revocation is to be exercised by a trustee with the consent of a beneficiary, the consent may be given while the beneficiary is a minor, if this appears to be the testator's intention<sup>3</sup>.

1 *Pomfret v Perring* (1854) 5 De GM & G 775; *Re Barker's Settlement, Knocker v Vernon Jones* [1920] 1 Ch 527. See also *Charles v Burke* (1888) 43 ChD 223n; and the other cases cited in PARA 344 post.

2 *Re Wells' Trusts, Hardisty v Wells* (1889) 42 ChD 646. As to circumstances under which a power of revocation may be impliedly exercised see *Quin v Armstrong* (1876) IR 11 Eq 161. See also PARA 343 et seq post.

3 *Re Sutton, Boscawen v Wyndham* [1921] 1 Ch 257. See also PARA 266 ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(i) Contingent Powers/332. Types of contingency.

## (4) CONTINGENT AND DETERMINABLE POWERS

### (i) Contingent Powers

#### 332. Types of contingency.

A contingency or condition may qualify the existence of the power, so that the power does not come into existence until the contingency occurs or the condition is satisfied, or it may merely qualify the operation of any exercise of the power, so that, although the power is in existence throughout, no exercise of the power can take effect until the contingency has occurred or the condition has been satisfied. The matter is one of construction, but the court is inclined to treat a contingency or condition as being of the latter type, qualifying only the exercise of the power<sup>1</sup>. Where the power is a power of sale, the mere fact that the property is a reversion does not imply a condition that the power is not to be exercisable until the property falls into possession<sup>2</sup>. Nor does a power for a donee to appoint 'after any marriage' of his cease to be exercisable after his marriage ends<sup>3</sup>.

1 *Hanbury v Bateman* [1920] 1 Ch 313 at 318 per Sargant J.

2 See *Tasker v Small* (1834) 6 Sim 625; *Clark v Seymour* (1834) 7 Sim 67; *Blackwood v Borrowes* (1843) 4 Dr & War 441; *Giles v Homes* (1846) 15 Sim 359.

3 *Re Rantzen's Settlement, Re Rantzen's Deed of Appointment, Rantzen v Rantzen and Ingram* [1940] Ch 243. Contrast *Re Poole's Settlements' Trusts, Poole v Poole* [1959] 2 All ER 340, [1959] 1 WLR 651, where a husband and wife had a joint power of appointment; on their divorce, the wife's powers were extinguished as if she were dead and the court held that the husband could exercise the power alone as the 'survivor'. See also PARAS 274 ante, 387 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(i) Contingent Powers/333. Prospective exercise.

#### 333. Prospective exercise.

If a contingency or condition merely qualifies the operation of any exercise of a power presently given to a designated person, the power may validly be exercised even before the contingency occurs or the condition is satisfied, and the execution of the power will accordingly take effect when the contingency occurs or the condition is satisfied<sup>1</sup>. On the other hand, if the power does not arise until some future or contingent event occurs, or some condition is satisfied, it cannot be exercised before then, for until then it has no existence<sup>2</sup>. Nevertheless, even in these cases literal compliance is not required where an event a fortiori has occurred, as where a power is exercisable if the donee's children fail to attain full age and the donee dies without marrying<sup>3</sup>; and a power has even been held exercisable when only part of a condition has been fulfilled<sup>4</sup>. However, where the performance of an act is made a condition precedent to the exercise of a power, and such performance is illegal or becomes impossible, the power cannot be executed<sup>5</sup>.

1 *Anon* (1574) 2 Leon 220; *Holt v Burley* (1710) 2 Vern 651; *Countess of Sutherland v Northmore* (1729) 1 Dick 56; *Dalby v Pullen* (1824) 2 Bing 144; *Logan v Bell* (1845) 1 CB 872; *Eden v Wilson* (1852) 4 HL Cas 257 at 283; *Wandesforde v Carrick* (1871) IR 5 Eq 486; *Re Coulman, Munby v Ross* (1885) 30 ChD 186; *Hanbury v Bateman* [1920] 1 Ch 313. See to the contrary *Re Walsh's Trusts* (1878) 1 LR Ir 320; *Blight v Hartnoll* (1881) 19 ChD 294; and see also *Chadwick v Doleman* (1705) 2 Vern 528 (contingency failed).

2 *Meyrick v Coutts* (1806) Sugden on Powers (8th Edn) 266; *Shaw v Borrer* (1836) 1 Keen 559; *Blacklow v Laws* (1842) 2 Hare 40; *Johnstone v Baber* (1845) 8 Beav 233; *Mosley v Hide* (1851) 17 QB 91; *Earle v Barker* (1865) 11 HL Cas 280; *Want v Stallibrass* (1873) LR 8 Exch 175; *Re Verschoyle's Trusts* (1879) 3 LR Ir 43; *Wilkinson v Thornhill* (1889) 61 LT 362. Contrast *Uvedale v Uvedale* (1744) 3 Atk 117; *Ashford v Cafe* (1836) 7 Sim 641. As to a mortgagee's power of sale see MORTGAGE vol 77 (2010) PARA 440 et seq.

3 *Daniel v McCabe and Cooney* [1951] IR 133, applying the rule in *Jones v Westcomb* (1711) Prec Ch 316. See WILLS vol 50 (2005 Reissue) PARA 732.

4 *Davidson v Rook* (1856) 22 Beav 206; disapproved in Sugden on Powers (8th Edn) 266.

5 *Earl of Shrewsbury v Scott* (1859) 6 CBNS 1; affd (1860) 6 CBNS 221, Ex Ch.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(i) Contingent Powers/334. Contracts to exercise contingent powers.

### **334. Contracts to exercise contingent powers.**

If, before the event the subject of the contingency happens, the donee covenants for valuable consideration to exercise the power and fails to do so, the court will, if the power is general<sup>1</sup> and exercisable by deed, treat the power as properly executed as from the date of the happening of the event<sup>2</sup>. However, if the power is exercisable by will only, the remedy, if any, will be an action for damages<sup>3</sup>.

1 As to the powers of jointuring see PARA 248 et seq ante.

2 *Countess Dowager of Coventry v Earl of Coventry* (1724) 2 P Wms 222; *Jackson v Jackson* (1793) 4 Bro CC 462; *Affleck v Affleck* (1857) 3 Sm & G 394; *Johnson v Touchet* (1867) 16 WR 71; *Re Lambert's Estate* [1901] 1 IR 261, Ir CA. See also PARAS 250 et seq ante, 359 post.

3 *Palmer v Locke* (1880) 15 ChD 294, CA; *Re Evered, Molineux v Evered* [1910] 2 Ch 147 at 156, CA; *Re Cooke, Winckley v Winterton* [1922] 1 Ch 292. As to covenants see further PARA 285 ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(i) Contingent Powers/335. Exercise of powers by contingent persons.

### **335. Exercise of powers by contingent persons.**

A general power of appointment, whether affecting the legal estate or the equitable interest, may be well exercised by deed or will by a person contingently entitled to exercise the power if in the event he proves to be the person actually entitled<sup>1</sup>. A limited power given to a contingent person may not be exercised until the person to exercise it is determined<sup>2</sup>; but under a limited power exercisable jointly by A and any wife he may marry, and in default by the survivor, A, while a widower, is the survivor and not a contingent person<sup>3</sup>.

1 *Thomas v Jones* (1862) 1 De GJ & Sm 63. Under the older law a general power affecting equitable interests could be exercised before the person to exercise it was determined by the event, but a similar power affecting the legal estate could not. The case of a power which, in the event, never comes into existence must be distinguished: see *Willock v Noble* (1875) LR 7 HL 580 at 590.

2 *MacAdam v Logan* (1791) 3 Bro CC 310; *Cave v Cave* (1856) 8 De GM & G 131; *Re Twiss's Settlement Trusts* (1867) 15 WR 540; *Re Moir's Settlement Trusts* (1882) 46 LT 723; *Re Blackburn, Smiles v Blackburn*



(1889) 43 ChD 75. See also *Re Hayes, Turnbull v Hayes* [1901] 2 Ch 529, CA; *Re Bradshaw, Bradshaw v Bradshaw* [1902] 1 Ch 436; *Re Walpole's Marriage Settlement, Thomson v Walpole* [1903] 1 Ch 928.

3 *Re Miller, Miller v Walcott* (1923) 129 LT 666.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(i) Contingent Powers/336. Acceleration of event.

### **336. Acceleration of event.**

The event on which the power is to arise may be accelerated by the parties if the power is simply administrative, but not if it is a power to charge or is otherwise burdensome to the estate<sup>1</sup>.

1 *Truell v Tysson* (1856) 21 Beav 437. See also *Re Petre's Settlement Trusts, Legh v Petre* [1910] 1 Ch 290; *Re Trevanion, Trevanion v Lennox* [1910] 2 Ch 538.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(ii) Determinable Powers/337. Exercise of the power.

## **(ii) Determinable Powers**

### **337. Exercise of the power.**

A power determinable on the happening of any event must be exercised before the event happens<sup>1</sup>. The making of a will cannot ordinarily be treated as an act exercising the power so as to make the exercise take effect as from the date of the will instead of the date of the death<sup>2</sup>. Hence a testamentary appointment by a donee who outlives the power may fail to take effect even if the will was executed while the power was still exercisable<sup>3</sup>. The question, however, is really one of construction of the instrument creating the power; if it is not made essential that the exercise of the power should become operative as well as take place during the continuance of the power, an inchoate exercise by will within the time limited for its exercise is good, even if the will does not become operative by the donee's death until after that time<sup>4</sup>.

1 *Parsons v Parsons* (circa 1747) 9 Mod Rep 464; *Re Borrowes' Estate* (1868) IR 2 Eq 468; *Potts v Britton* (1871) LR 11 Eq 433.

2 *Re Moses, Beddington v Beddington* [1902] 1 Ch 100 at 115, CA, per Vaughan Williams LJ; affd sub nom *Beddington v Baumann* [1903] AC 13, HL, where the question had reference to premiums arising out of the property appointed after the execution of the will containing the appointment, but before the death of the appointor and not expressly included in the appointment. See also *Re Butler's Settlement Trusts* [1942] Ch 403, [1942] 2 All ER 191 (cited in PARA 344 note 6 post); *Duke of Marlborough v Lord Godolphin* (1750) 2 Ves Sen 61 at 76.

3 *Cooper v Martin* (1867) 3 Ch App 47; *Potts v Britton* (1871) LR 11 Eq 433.

4 *Re Illingworth, Bevir v Armstrong* [1909] 2 Ch 297; following *Burnham v Bennett* (1845) 2 Coll 254; and distinguishing *Cooper v Martin* (1867) 3 Ch App 47. *Re Illingworth, Bevir v Armstrong* supra (where the power was to appoint by will or deed during coverture, and, the testatrix dying discovert, an appointment by a will executed during coverture was held good) is not easily reconciled with dicta in *Re Moses, Beddington v Beddington* [1902] 1 Ch 100, CA. But the decision in the latter case turned upon a separate point, and the

question dealt with was the date as at which the property included in a testamentary appointment is to be ascertained, rather than the period within which the appointment must be exercised. *Re Illingworth, Bevir v Armstrong* supra was approved and followed in *Re Safford's Settlement, Davies v Burgess* [1915] 2 Ch 211, where a will made during coverture was held to be a good exercise of a power to appoint by will during coverture although the testatrix survived her husband. See also *Holliday v Overton* (1852) 14 Beav 467 (affd 20 LTOS 12); *Cave v Cave* (1856) 8 De GM & G 131; *Re Blackburn, Smiles v Blackburn* (1889) 43 ChD 75. Other cases on powers to appoint during coverture are *Price v Parker* (1848) 16 Sim 198; *Trimmell v Fell* (1853) 16 Beav 537.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(4) CONTINGENT AND DETERMINABLE POWERS/(ii) Determinable Powers/338. Joint powers.

### **338. Joint powers.**

A power of revocation to be exercised by A and B or the survivor of them 'during their joint lives' determines on the death of either A or B<sup>1</sup>. A power of appointment given to the survivor to be exercised 'after the decease of the other of them' cannot be exercised by will executed by the survivor during the life of the other unless confirmed by a codicil after the other's death<sup>2</sup>. Further, a power exercisable by the survivor of A and B is not well exercised by a deed executed by both<sup>3</sup>.

1 *Re Twiss's Settlement Trusts* (1867) 15 WR 540. See further PARA 347 post.

2 *Re Blackburn, Smiles v Blackburn* (1889) 43 ChD 75.

3 *MacAdam v Logan* (1791) 3 Bro CC 310.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(5) PRIORITY AND TIME OF OPERATION/339. Appointments under the same power.

## **(5) PRIORITY AND TIME OF OPERATION**

### **339. Appointments under the same power.**

In the absence of any contrary intention, two or more appointments made by the same instrument under the same power all rank equally, but, if they are made by different instruments, they rank according to the date of those instruments<sup>1</sup>.

1 *Bulteel v Plummer* (1870) 6 Ch App 160; *Wilson v Kenrick* (1885) 31 ChD 658; *Re Lord Annaly's Estate* (1889) 23 LR Ir 481; *Re Keele Estates, Aveling v Sneyd* [1952] Ch 306, [1952] 1 All ER 44 (revsd on another point [1952] Ch 603, [1952] 2 All ER 164, CA).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(5) PRIORITY AND TIME OF OPERATION/340. Appointments under different powers.

### **340. Appointments under different powers.**

In the absence of any contrary intention, two or more appointments made respectively under different powers take effect according to the priority of the powers creating them, as if they

had been inserted in the instrument creating the powers<sup>1</sup>. Thus, from the relative positions of the power to jointure and the portions term in the settlement, portions may have priority over a jointure<sup>2</sup> and vice versa<sup>3</sup>; and charges created by a settlement may be postponed to a subsequent charge created under a power having priority to the charges<sup>4</sup>. Priority depends on the intention of the donor and the nature of the power<sup>5</sup>; and if A and B have a joint power, and A also has a sole power exercisable after B's death, an earlier sole appointment by A may take priority over a subsequent joint appointment<sup>6</sup>. Further, the doctrine of marshalling<sup>7</sup> applies to property subject to a power reserved by the settlor in the same way as it applies to his free estate<sup>8</sup>.

1 Co Litt 272a, Butler's note vii, 2; *Earl of Uxbridge v Bayly* (1792) 1 Ves 499 at 509; *Lord Braybrooke v A-G* (1861) 9 HL Cas 150; *A-G v Earl of Selborne* [1902] 1 KB 388 at 394, CA; *Re Bolton Estates Act 1863* [1904] 2 Ch 289; *Re Dunbar-Buller* [1923] 2 IR 143, Ir CA; and see PARA 206 ante.

2 *Bevan v Bevan* (1883) 13 LR Ir 53.

3 See *Bailey v Tennant* (1856) 11 Exch 776 (rentcharge for second wife). Contrast *Re Lord Annaly's Estate* (1889) 23 LR Ir 481; and see *Re Creagh's Estate Lane, Petitioner* (1890) 25 LR Ir 128.

4 *Mosley v Mosley* (1800) 5 Ves 248.

5 See *Beale v Beale* (1713) 1 P Wms 244, where a power to jointure was held to be prior to a power to charge. See also *Stackhouse v Barnston* (1805) 10 Ves 453.

6 *Re Lambert's Estate* [1901] 1 IR 261, Ir CA.

7 See as applied in *Averall v Wade* (1835) L & G temp Sugd 252. As to the application of the doctrine of marshalling see EQUITY vol 16(2) (Reissue) PARA 758 et seq.

8 *Re Barker's Estate* (1879) 3 LR Ir 395; *M'Carthy v M'Cartie (No 2)* [1904] 1 IR 100, Ir CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(5) PRIORITY AND TIME OF OPERATION/341. Nature of powers as affecting priorities.

### **341. Nature of powers as affecting priorities.**

Certain powers, by their nature, are presumed to have priority. Thus a jointure takes effect immediately upon the death of the husband, and unless otherwise provided by the instrument creating the power or by the appointment, it normally overrides all other powers and estates in the same settlement<sup>1</sup>, but not powers and estates in another settlement<sup>2</sup>. However, it has no precedence if it is intended merely to be one of several rentcharges<sup>3</sup>. Subject to any contrary intention in the settlement, powers of sale, exchange and partition<sup>4</sup> override all estates created by the settlement, but not any estates created under paramount powers<sup>5</sup>; and powers of leasing<sup>6</sup>, being administrative, have a similar precedence, even if there is no clause marshalling the powers<sup>7</sup>.

1 *Sandys v Sandys* (1721) 1 P Wms 707; *Hall v Carter* (1742) 2 Atk 354; *Reynolds v Meyrick* (1758) 1 Eden 48. As to powers of jointuring see PARA 248 et seq ante.

2 *Re Nash* (1856) 5 I Ch R 384, PC.

3 *Coore v Todd* (1857) 7 De GM & G 520.

4 As to these powers see PARA 229 ante.

5 As to the overreaching effect of a disposition by a tenant for life under the Settled Land Act 1925 see s 72; the Law of Property Act 1925 s 2(1), (1A) (as added); and REAL PROPERTY vol 39(2) (Reissue) PARA 247 et seq; SETTLEMENTS vol 42 (Reissue) PARA 874.

6 As to such powers see PARA 232 et seq ante.

7 *Yelland v Ficlis* (1604) Moore KB 788; *Taylor v Stibbert* (1794) 2 Ves 437; *Isherwood v Oldknow* (1815) 3 M & S 382 at 405; *Doe d Courtail v Thomas* (1829) 9 B & C 288; *Skeeles v Shearly* (1836) 8 Sim 153 at 158; *Wortham v Pemberton*, *Newenham v Pemberton* (1847) 1 De G & Sm 644 at 659; *Lewis v Rees* (1856) 3 K & J 132 at 149. See also PARA 340 note 7 ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(5) PRIORITY AND TIME OF OPERATION/342. Time of operation.

### 342. Time of operation.

A trust in an appointment under a power is 'constituted'<sup>1</sup> when the power is exercised, if the power is general<sup>2</sup>, but when it is created, if it is special<sup>3</sup>. Although the interest created by the exercise of a special power arises under the appointment<sup>4</sup>, it is by virtue of the instrument creating the power that the appointee takes his interest<sup>5</sup>; for it is as though the settlor had left a blank in the settlement and had given the donee the right to fill it up<sup>6</sup>. Thus if under a power to appoint to children an appointment is made to a legitimated child, it will be invalid unless he is legitimated for the purpose not only of the appointment but also of the power<sup>7</sup>. The same principle applies to an appointment to an adopted child<sup>8</sup>.

1 Ie constituted for the purposes of the Trustee Act 1925 s 32(3): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 76.

2 *Re Bransbury's Will Trusts*, *Grece v Bransbury* [1954] 1 All ER 605, [1954] 1 WLR 496.

3 *Re Batty, Public Trustee v Bell* [1952] Ch 280, [1952] 1 All ER 425; contrast *Hart (Inspector of Taxes) v Briscoe* [1979] Ch 1, [1978] 1 All ER 791. See also *Muir (or Williams) v Muir* [1943] AC 468, HL; and PARA 316 ante.

4 See *Re de la Bere's Marriage Settlement Trusts*, *de la Bere v Public Trustee* [1941] Ch 443, [1941] 2 All ER 533; *Begg-MacBrearty (Inspector of Taxes) v Stilwell (Trustee of the GE Coke Settlement)* [1996] 4 All ER 205, [1996] 1 WLR 951 (reduction in age of majority under the Family Law Reform Act 1969 s 1(4), Sch 3 para 5(1) applied to appointment made in 1975 under pre-1970 settlement).

5 *Re Dowie's Will Trusts*, *Re Marriage Settlement of September 24, 1936*, *Barlas v Pennefather* [1949] Ch 547 at 553, [1949] 1 All ER 968 at 971. See also *Re Batty, Public Trustee v Bell* [1952] Ch 280, [1952] 1 All ER 425; contrast *Hart (Inspector of Taxes) v Briscoe* [1979] Ch 1, [1978] 1 All ER 791.

6 *Muir (or Williams) v Muir* [1943] AC 468 at 483, HL, per Lord Romer; *Hart (Inspector of Taxes) v Briscoe* [1979] Ch 1, [1978] 1 All ER 791.

7 *Re Hoff, Carnley v Hoff* [1942] Ch 298, [1942] 1 All ER 547; *Re Billson's Settlement Trusts* [1984] Ch 409, [1984] 2 All ER 401, CA. For the position where appointments are made after 4 April 1988 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125 et seq.

8 *Re Brinkley's Will Trusts*, *Westminster Bank v Brinkley* [1968] Ch 407, [1967] 3 All ER 805; and see *Re Valentine's Settlement*, *Valentine v Valentine* [1965] Ch 831, [1965] 2 All ER 226, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/343. Mode of exercise.

## (6) REVOCATION OF APPOINTMENTS

## (i) Power of Revocation

### 343. Mode of exercise.

Although a revocation must precede in time any new appointment, a power of revocation and new appointment may be exercised by a single instrument<sup>1</sup>.

<sup>1</sup> *Fitzwilliam's Case* (1604) 6 Co Rep 32a at 33b. See also *Re Hawkins, ex p Official Receiver* [1892] 1 QB 890 at 904.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/344. Intention to revoke.

### 344. Intention to revoke.

A power of revocation is not a power of appointment, but often the exercise of a power of revocation is a condition precedent to the exercise of a power of appointment. It is necessary to show not merely an intention to appoint, but an intention to revoke the existing appointment<sup>1</sup>. Thus a general devise or bequest<sup>2</sup> standing alone does not show a sufficient intention to revoke as well as to appoint<sup>3</sup>; nor does a reappointment by will exercise a power of revocation exercisable by deed<sup>4</sup>. Again, an appointment expressed to be made in exercise of every power enabling the appointor does not extend to property which he cannot appoint without the exercise of a power of revocation, if there is other property to which the words might apply<sup>5</sup>, or if the appointment is in a will executed before the power of revocation was reserved<sup>6</sup>. It is otherwise if the purported appointment<sup>7</sup> or conveyance<sup>8</sup> would be entirely ineffectual if it were not to be treated as exercising the power of revocation; and, if the intention to revoke is otherwise clear, it is not essential to refer expressly to the power of revocation<sup>9</sup>.

<sup>1</sup> *Pomfret v Perring* (1854) 5 De GM & G 775; *Re Wells' Trusts, Hardisty v Wells* (1889) 42 ChD 646.

<sup>2</sup> *Re one taking effect under the Wills Act 1837 s 27* (see PARA 310 ante). For the position before that Act see *Deg v Deg* (1727) 2 P Wms 412 at 414.

<sup>3</sup> *Palmer v Newell* (1855) 20 Beav 32 at 38; *Nanney v Williams* (1856) 22 Beav 452; *Re Jones, Greene v Gordon* (1886) 34 ChD 65; *Re Gibbes' Settlement, White v Randolph* (1887) 37 ChD 143; *Charles v Burke* (1888) 43 ChD 223n; *Re Brace, Welch v Colt* [1891] 2 Ch 671; *Re Wallinger's Estate* [1898] 1 IR 139, Ir CA; *Re Goulding's Settlement, Dobell v Dutton* (1899) 48 WR 183; *Re Hall, Rawlings v Hall* (1903) 19 TLR 420; *Re Thursby's Settlement, Grant v Littledale* [1910] 2 Ch 181, CA.

<sup>4</sup> *Re Hambro's Marriage Settlements, Hambro v Hambro* [1949] Ch 111; on appeal [1949] Ch 484 at 489-490, CA, where the Court of Appeal left this point open.

<sup>5</sup> *Pomfret v Perring* (1854) 5 De GM & G 775; *Re Hall, Rawlings v Hall* (1903) 19 TLR 420; *Re Thursby's Settlement, Grant v Littledale* [1910] 2 Ch 181, CA.

<sup>6</sup> *Re Butler's Settlement Trusts* [1942] Ch 403, [1942] 2 All ER 191.

<sup>7</sup> *Re Barker's Settlement, Knocker v Vernon Jones* [1920] 1 Ch 527.

<sup>8</sup> *Re Lees' Trusts, Lees v Lees* [1926] WN 220.

<sup>9</sup> *Re Chatterton's Settlement, Fox v Powell* [1946] Ch 284, [1946] 2 All ER 211.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/345. Effect of failure of appointment.

### **345. Effect of failure of appointment.**

If the intention to revoke in all events is clear, it makes no difference that the appointees substituted in place of the original appointees cannot take; but if the appointment is revoked in order to make a gift in favour of another person, and there is no intention to revoke except for that purpose, the removal of the ground of revocation nullifies the revocation<sup>1</sup>.

<sup>1</sup> *Quinn v Butler* (1868) LR 6 Eq 225; *Onions v Tyrer* (1716) 1 P Wms 343. Contrast the analogous case of dependent relative revocation: see WILLS vol 50 (2005 Reissue) PARA 400.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/346. Partial revocation.

### **346. Partial revocation.**

A deed of appointment containing a power of revocation and new appointment must be acted on even if there is evidence that a subsequent appointment in unascertainable terms has been made<sup>1</sup>. Further, if the words of a clause reserving a power of revocation extend by necessary grammatical construction to some only of several appointments made by the same instrument, a subsequent execution of the power does not revoke all the appointments made by the instrument<sup>2</sup>.

<sup>1</sup> *Rawlins v Rickards* (1860) 28 Beav 370 at 374; cf *Onions v Tyrer* (1716) 1 P Wms 343.

<sup>2</sup> *Morgan v Gronow* (1873) LR 16 Eq 1.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/347. Reservation of power of revocation.

### **347. Reservation of power of revocation.**

A power may show an intention that an appointment is to be exercisable only during a limited period or in a specified manner, or that no power of revocation is to be reserved<sup>1</sup>. Subject to this, an appointment may reserve powers of revocation and new appointment as often as the occasion arises, even if such a reservation is not expressly authorised by the instrument creating the power<sup>2</sup>. However, where the power of appointment is given to two persons or to the survivor, a power of revocation may be reserved to the survivor<sup>3</sup>, but not to one of the two in the lifetime of the other<sup>4</sup>.

<sup>1</sup> *Piper v Piper* (1834) 3 My & K 159 at 165 per Lord Brougham LC. See also *Cooper v Martin* (1867) 3 Ch App 47; *Re Safford's Settlement*, *Davies v Burgess* [1915] 2 Ch 211.

<sup>2</sup> *Re Gore-Booth's Estate* [1908] 1 IR 387; Sugden on Powers (8th Edn) 387.

3 *Brudenell v Elwes* (1802) 7 Ves 382; *Dixon v Pyner* (1886) 55 LJ Ch 566; *Re Harding, Rogers v Harding* [1894] 3 Ch 315, CA; *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223, [1964] 3 All ER 82.

4 *Burnaby v Baillie* (1889) 42 ChD 282.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/348. Adherence to original conditions.

### **348. Adherence to original conditions.**

The formalities to accompany the revocation and new appointment need not be the same as the requirements stipulated in the original execution<sup>1</sup>. Thus a power of revocation reserved to the survivor of joint appointors may be made exercisable by deed even if his power of appointment as the survivor is by will only<sup>2</sup>. However, the objects of a limited power may not be altered by the machinery of an appointment to them reserving a power of revocation and new appointment in favour of others; and probably a limited power exercisable with the consent of A could not be exercised reserving a power of revocation and appointment without A's consent<sup>3</sup>.

1 Sugden on Powers (8th Edn) 366.

2 *Re Weightman's Settlement, Astle v Wainwright* [1915] 2 Ch 205.

3 Farwell on Powers (3rd Edn) 305.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/349. Need for express reservation of power.

### **349. Need for express reservation of power.**

On the principle that a deed cannot be revoked unless it reserves a power of revocation, a power, once executed, may not be revoked unless a power of revocation is reserved by the instrument executing the power, even if the instrument creating the power expressly authorises revocation<sup>1</sup>. This principle does not necessarily apply to powers which may be and are exercised otherwise than by deed<sup>2</sup>. A power of revocation conferred by the instrument creating the original power of appointment confers power to make a fresh appointment, but a power of revocation in a deed executing a power does not of itself authorise a new appointment<sup>3</sup>.

1 *Worrall v Jacob* (1817) 3 Mer 256; Sugden on Powers (8th Edn) 387, 390, 908; *Hele v Bond* (1717) Prec Ch 474; *Lord Teynham v Webb* (1751) 2 Ves Sen 198 at 211; *Re Gore-Booth's Estate* [1908] 1 IR 387. See also *Re Booker, Booker v Booker* (1886) 34 WR 346 at 347. The appointment may be avoidable on the ground of mistake if made in forgetfulness of an earlier appointment: *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476; and see MISTAKE vol 77 (2010) PARA 40.

2 *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223 at 233, [1964] 3 All ER 82 at 87.

3 Sugden on Powers (8th Edn) 371, 374; *Witham v Bland* (1674) 3 Swan 277n.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(i) Power of Revocation/350. Survival of power after revocation of appointment.

### **350. Survival of power after revocation of appointment.**

If a power of revocation in an appointment is exercised, the power of appointment remains unaffected; and if an appointment contains a power of revocation and new appointment, it does not constitute a new settlement in place of the original settlement or exhaust the original power, so that, if the appointment is revoked, the original power remains in full force. Where there is a power of appointment to be exercised by deed or by will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to make a fresh appointment by deed, and there is a simple revocation of this instrument, then, provided the original power is still in full force, there may be a valid execution of the original power on revocation by will as well as by deed<sup>1</sup>. These rules do not apply to powers which are executed by will, for by its nature a will is always revocable<sup>2</sup>. If the original power of appointment is not a primary power enabling the donee to appoint the trusts, but the land is settled on trusts which the donee is enabled to revoke and limit anew, the trusts of the original settlement are not revived if the power of revocation and new appointment is exercised and then this second appointment is revoked without more<sup>3</sup>.

<sup>1</sup> *Sheffield v Von Donop* (1848) 7 Hare 42; *Montagu v Kater* (1853) 8 Exch 507; *Saunders v Evans* (1861) 8 HL Cas 721.

<sup>2</sup> *Lisle v Lisle* (1781) 1 Bro CC 533; *Lawrence v Wallis* (1788) 2 Bro CC 319. See also WILLS vol 50 (2005 Reissue) PARA 384 et seq.

<sup>3</sup> *Ward v Lenthall* (1667) 1 Sid 343; *Witham v Bland* (1674) 3 Swan 277n; *Evans v Saunders*, *Evans v Evans* (1855) 6 De GM & G 654 at 678 per Turner LJ.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(ii) Revocation by Will/351. Subsequent testamentary document.

## **(ii) Revocation by Will**

### **351. Subsequent testamentary document.**

Unless cogent evidence is given that the revocation is unreasonable<sup>1</sup>, a general clause in a will revoking all former wills prima facie revokes a prior testamentary appointment<sup>2</sup>. However, the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior will, and revokes it only to the extent to which it is inconsistent with it<sup>3</sup>. Therefore, if a will exercising a limited power contains other devises and is followed by a later will, which is declared to be the testator's last will, and which disposes of all his real estate but is not expressed to revoke any previous instrument, the subsequent will has no effect on the appointment made by the prior will<sup>4</sup>.

<sup>1</sup> *Smith v Thompson* (1931) 146 LT 14; *Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* [1935] P 151.



2 *Sotheran v Dening* (1881) 20 ChD 99, CA. See also *Re Kingdon*, *Wilkins v Pryer* (1886) 32 ChD 604; distinguishing *Re Merritt* (1858) 1 Sw & Tr 112; *Re Joys* (1860) 4 Sw & Tr 214; and *Harvey v Harvey* (1875) 32 LT 141.

3 *Re Hawksley's Settlement*, *Black v Tidy* [1934] Ch 384. See also *Duguid v Fraser* (1886) 31 ChD 449; *Re Walker*, *MacColl v Bruce* [1908] 1 Ch 560; *Nixon v Prince* (1918) 34 TLR 444, where it was held that the testator's original will was not revoked, so far as realty was concerned, by a later will made by him, as a soldier (before the Wills (Soldiers and Sailors) Act 1918 was passed); *Re Burton's Settlements*, *Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193, where it was held that a direction in a will that, if an appointee refused to settle an appointed share, the will should take effect as if the appointee were not the testator's child, did not amount to a revocation of the appointment.

4 This is so whether before or after the Wills Act 1837. See *Pitt v Jackson* (1786) 2 Bro CC 51; *Freeman v Freeman* (1854) Kay 479 at 487 per Wood V-C (affd 5 De GM & G 704); *Lemage v Goodban* (1865) LR 1 P & D 57; *Shiel v O'Brien* (1872) IR 7 Eq 64; *Cadell v Wilcocks* [1898] P 21; *Kent v Kent* [1902] P 108.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/3. EXERCISE OF POWERS/(6) REVOCATION OF APPOINTMENTS/(ii) Revocation by Will/352. Marriage.

### 352. Marriage.

A will made after 1925 and expressed to be made in contemplation of a marriage is not revoked by the solemnisation of the marriage contemplated<sup>1</sup>. Subject to this, every will made by any person is revoked by his or her marriage, although a disposition in a will in exercise of a power of appointment takes effect notwithstanding the testator's subsequent marriage, unless the property so appointed would in default of appointment pass<sup>2</sup> to his personal representatives<sup>3</sup>. This statutory exception extends to the case where, in default of appointment, the property goes in the way stated only in the event of certain contingencies happening. It also applies to the case where, in default of appointment, the property of which the will disposes passes under the settlement containing the power, even if the same persons would take under the settlement as would have taken in the case of an intestacy<sup>4</sup>. Apart from this statutory exception, an appointment by will is revoked by any act amounting to a revocation in law of a proper will<sup>5</sup>.

1 Law of Property Act 1925 s 177 (repealed in respect of a will made on or after 1 January 1983): see WILLS vol 50 (2005 Reissue) PARA 380. For a will made on or after 1 January 1983 see the Wills Act 1837 s 18 (as substituted); and WILLS vol 50 (2005 Reissue) PARA 381. See also *Pilot v Gainfort* [1931] P 103; *Sallis v Jones* [1936] P 43, where it was held that the will must contain more than a reference to marriage generally; *Re Langston* [1953] P 100, [1953] 1 All ER 928 (distinguished in *Re Coleman*, *Coleman v Coleman* [1976] Ch 1, [1975] 1 All ER 675); WILLS vol 50 (2005 Reissue) PARA 379 et seq.

2 I.e. under the Administration of Estates Act 1925: see WILLS vol 50 (2005 Reissue) PARA 332 et seq.

3 Wills Act 1837 s 18(2) (as substituted): see WILLS vol 50 (2005 Reissue) PARA 379. As to the position before 1 January 1983 see the Wills Act 1837 s 18 as originally enacted; *Re Russell* (1890) 15 PD 111; *Re Paul*, *Public Trustee v Pearce* [1921] 2 Ch 1; *Re Gilligan* [1950] P 32, [1949] 2 All ER 401 (next of kin includes widow).

4 *Re Fenwick* (1867) LR 1 P & D 319; *Re McVicar* (1869) LR 1 P & D 671; *Re Worthington* (1871) 20 WR 260.

5 *Reid v Shergold* (1805) 10 Ves 370; Sugden on Powers (8th Edn) 458. As to the voluntary revocation of wills see WILLS vol 50 (2005 Reissue) PARA 384 et seq. See also *Velasco v Coney* [1934] P 143, where a power exercised by will was valid by Italian and English law, the revocation of the will was in conformity with the requirements of Italian law only, and it was held that the appointment had been revoked). See also PARA 307 ante; and CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 458-459, 464.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(1) EXCESSIVE EXECUTION/353. Nature of excessive execution.

## 4. INVALID EXERCISE OF POWERS

### (1) EXCESSIVE EXECUTION

#### 353. Nature of excessive execution.

There is excessive execution of a power if an exercise of the power transgresses the rule against perpetuities<sup>1</sup> or exceeds the scope of the power<sup>2</sup>. The scope of the power may be exceeded in the following ways: by granting excessive interests, annexing conditions, adding limitations or modifications or delegating powers. If there is a complete execution of the power with the addition of something improper, the execution is good and the excess bad, whereas if there is no complete execution, or if the boundaries between the excess and the execution are not distinguishable, the whole appointment fails<sup>3</sup>. In order to be valid, the appointment must be distinct and absolute<sup>4</sup>.

1 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1090 et seq. For the distinction between a power invalid ab initio and one of which a particular exercise is invalid see *Re Watson's Settlement Trusts, Dawson v Reid* [1959] 2 All ER 676, [1959] 1 WLR 732. See also *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL; *Re Hunter's Will Trusts, Gilks v Harris* [1963] Ch 372, [1962] 3 All ER 1050; *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175; *IRC v Williams* [1969] 3 All ER 614, [1969] 1 WLR 1197; *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.

2 See *Re Lonsdale's Will Trusts, Lowther v Lowther* [1960] Ch 288, [1959] 3 All ER 679, CA; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

3 *Alexander v Alexander* (1755) 2 Ves Sen 640 at 644; *Adams v Adams* (1777) 2 Cowp 651; *Hamilton v Royse* (1804) 2 Sch & Lef 315 at 332; *McDonald v McDonald* (1875) LR 2 Sc & Div 482; *Re Farncombe's Trusts* (1878) 9 ChD 652; *Re Cohen, Brookes v Cohen* [1911] 1 Ch 37; *Re Holland, Holland v Clapton* [1914] 2 Ch 595; *Mackenzie's Trustees v Mackenzie* 1927 SC 424.

4 *Reid v Reid* (1858) 25 Beav 469; *Rucker v Scholefield* (1862) 1 Hem & M 36; *Re Oliphant's Trusts, Re Dixon's Will, Phillips v Phelps* (1916) 86 LJ Ch 452; *Re Johnson's Settlement Trusts, McClure v Johnson* [1943] Ch 341, [1943] 2 All ER 499.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(1) EXCESSIVE EXECUTION/354. Severance of appointment.

#### 354. Severance of appointment.

If a power becomes ineffective as to part of the property, an appointment of the whole is nevertheless good to that extent<sup>1</sup>. Again, where some of the appointees are objects and some are not, the appointment, if severable, is valid as to the objects alone<sup>2</sup>; but where the appointment is to a class which includes both objects and non-objects<sup>3</sup>, and is not severable, the whole appointment fails<sup>4</sup>.

1 *Re Turner, Hudson v Turner* [1932] 1 Ch 31; *Re Keele Estates (No 2) Aveling v Sneyd* [1952] Ch 603, [1952] 2 All ER 164, CA.

2 *Bruce v Bruce* (1871) LR 11 Eq 371; *Re Kerr's Trusts* (1877) 4 ChD 600.

3 As to the use of the word 'object' see PARA 209 note 1 ante. Accordingly, 'non-object' or 'stranger' means any person who is not a specified person or a member of the class.

4 *Harvey v Stracey* (1852) 1 Drew 73 at 117; *Rucker v Scholefield* (1862) 1 Hem & M 36; *Re Brown's Trust* (1865) LR 1 Eq 74. As to the principle of distribution pro rata see *Re Witty, Wright v Robinson* [1913] 2 Ch 666 at 673, CA, per Cozens-Hardy MR (no question of remoteness). Contrast *Re Cunard, Cunard v Cunard* (1918) 53 L Jo 63; but see *Raikes v Lygon* [1988] 1 All ER 884, [1988] 1 WLR 281, where the court's consent was obtained under the Settled Land Act 1925 s 64 (as amended) to the exercise of a power that would benefit non-objects.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(1) EXCESSIVE EXECUTION/355. Severance of trusts and conditions.

### 355. Severance of trusts and conditions.

If an appointment is made subject to an invalid but separable condition, the condition is bad but the appointment is valid<sup>1</sup>. Similarly, an appointment to an object subject to a charge for an unauthorised object is good but the charge fails<sup>2</sup>; and an appointment providing for a settlement<sup>3</sup> or subject to a qualifying trust<sup>4</sup> is void only so far as it applies to non-objects. Again, if, without appointing to any non-object, the donee attempts to delegate his power, and then makes a proper appointment in default of appointment by his delegate, the words of delegation are treated as being struck out and the appointment in default is valid<sup>5</sup>. However, an appointment subject to an inseparable condition is wholly void<sup>6</sup>, as also, it seems, is an appointment to an object upon trust for non-objects, on the ground either that it is indivisible<sup>7</sup> or that there is no intention to benefit objects<sup>8</sup>.

1 *Roberts v Dixwell* (1738) Sugden on Powers (8th Edn) 1 App 930; *Sadler v Pratt* (1833) 5 Sim 632; *Palsgrave v Atkinson* (1844) 1 Coll 190; *Watt v Creyke* (1856) 3 Sm & G 362; *Rooke v Rooke* (1862) 2 Drew & Sm 38; *Roach v Trood* (1876) 3 ChD 429, CA; *Re Holland, Holland v Clayton* [1914] 2 Ch 595; *Re Staveley, Dyke v Staveley* (1920) 90 LJ Ch 111; *Re Neave, Neave v Neave* [1938] Ch 793, [1938] 3 All ER 220. This last case was disapproved in *Re Simpson, Chadderton v Simpson* [1952] Ch 412, [1952] 1 All ER 963, on the ground that the appointment was fraudulent; but *Re Simpson* supra was itself not followed in *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193. See also PARAS 366, 368 post.

2 *Dowglass v Waddell* (1886) 17 LR Ir 384; *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276.

3 *Re Witty, Wright v Robinson* [1913] 2 Ch 666, CA; *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193. See also *Leahy v Payne* [1920] 1 IR 260 (condition in favour of another object).

4 *Carver v Bowles* (1831) 2 Russ & M 301 at 304; *Kampf v Jones* (1837) 2 Keen 756; *Harvey v Stracey* (1852) 1 Drew 73 at 137-143; *Re Lord Sondes' Will* (1854) 2 Sm & G 416; *Stephens v Gadsden* (1855) 20 Beav 463; *Woolridge v Woolridge* (1859) John 63; *Churchill v Churchill* (1867) LR 5 Eq 44; *McDonald v McDonald* (1875) LR 2 Sc & Div 482; *Dowglass v Waddell* (1886) 17 LR Ir 384; *Cooke v Cooke* (1887) 38 ChD 202; *Re Boyd, Nield v Boyd* (1890) 63 LT 92; *Re Witty, Wright v Robinson* [1913] 2 Ch 666 at 673, CA; *Re McCormick, Hazlewood v Foot* [1915] 1 IR 315 (restraint on anticipation struck out); *Re Manning's Trusts* (1915) 49 ILT 143; *Re Oliphant's Trusts, Re Dixon's Will, Phillips v Phelps* (1916) 86 LJ Ch 452; *Re Walker and Elgee's Contract* (1918) 53 ILT 22.

5 *Ingram v Ingram* (1740) 2 Atk 88; *Stockbridge v Story* (1871) 19 WR 1049; *Carr v Atkinson* (1872) LR 14 Eq 397; *Webb v Sadler* (1873) 8 Ch App 419; *Slark v Dakyns* (1874) 10 Ch App 35; *Williamson v Farwell* (1887) 35 ChD 128; *Re Witty, Wright v Robinson* [1913] 2 Ch 666, CA. See also *Re Boulton's Settlement Trust, Stewart v Boulton* [1928] Ch 703, where it was held that the power was invalid because it was both a delegation of the power and in excess of it. As a result, the appointment was invalid, and the gift to the remainderman was accelerated. See also PARA 291 ante.

6 *Webb v Sadler* (1873) 8 Ch App 419. See also *Hay v Watkins* (1843) 3 Dr & War 339; *D'Abbadie v Bizoin* (1871) IR 5 Eq 205; *Re Perkins, Perkins v Bagot* [1893] 1 Ch 283; *Re Cohen, Brookes v Cohen* [1911] 1 Ch 37.

7 See *Gerrard v Butler* (1855) 20 Beav 541; *Tomkyns v Blane* (1860) 28 Beav 422; *Rucker v Scholefield* (1862) 1 Hem & M 36.

8 See *Hamilton v Royse* (1804) 2 Sch & Lef 315 at 332; *Re Cohen, Brookes v Cohen* [1911] 1 Ch 37. See also *Wilson v Wilson* (1869) 17 WR 220; *Wallinger v Wallinger* (1869) LR 9 Eq 301; *Re Meredith's Trusts* (1876) 3 ChD 757; *Re Swinburne, Swinburne v Pitt* (1884) 27 ChD 696.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(1) EXCESSIVE EXECUTION/356. Executory gift over to stranger.

### **356. Executory gift over to stranger.**

If there is a gift over to a stranger<sup>1</sup> by way of executory limitation, the original gift fails on the occurrence of the event on which the executory gift was limited to take effect, although the gift over is distinct from the original gift and, being to a stranger, is void<sup>2</sup>. It is otherwise if the executory gift is void for remoteness<sup>3</sup> or if it may be inferred that the donee did not intend divesting to take place unless the gift over was effective, as where the gift over is to issue of the original appointee<sup>4</sup>. In these cases the original gift becomes absolute.

1 For the meaning of 'stranger' see PARA 354 note 3 ante.

2 *Brown v Nisbett* (1750) 1 Cox Eq Cas 13; *Doe d Blomfield v Eyre* (1848) 5 CB 713, Ex Ch; *Re Staples, Fitzherbert v Midland Bank Executor and Trustee Co Ltd* [1933] IR 126. See also *Bate v Willats* (1877) 37 LT 221. This rule is not peculiar to powers of appointment but may arise under ordinary gifts by will: see WILLS vol 50 (2005 Reissue) PARA 473.

3 *Re Brown and Sibly's Contract* (1876) 3 ChD 156; *Re Staveley, Dyke v Staveley* (1920) 90 LJ Ch 111; *Re Pratt's Settlement Trusts, McCullum v Phipps-Hornby* [1943] Ch 356, [1943] 2 All ER 458. See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1085, 1088.

4 See *Re Rooke, Rooke v Rooke* [1953] Ch 716, [1953] 2 All ER 110 (gift by will of testator absolutely entitled).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(1) EXCESSIVE EXECUTION/357. Valid appointment preceded by excessive appointment.

### **357. Valid appointment preceded by excessive appointment.**

Where property is appointed to a stranger for life with remainder to an object, the property will pass in default of appointment during the stranger's life, but, subject to this, the appointment to the object is valid<sup>1</sup>. The object's interest is not accelerated unless a contrary intention appears in the appointment<sup>2</sup>. On an appointment to a stranger with a contingent appointment over to an object, the appointment over takes effect if the contingency occurs, despite the failure of the appointment to the stranger<sup>3</sup>. Thus, if under a power to appoint to children there is an appointment to a grandchild, but if he dies before attaining full age, then to a child, the child will take only if the grandchild dies a minor; subject to this the property passes in default of appointment<sup>4</sup>.

1 *Crozier v Crozier* (1843) 3 Dr & War 353. See also *Alexander v Alexander* (1755) 2 Ves Sen 640; *Doe d Duke of Devonshire v Lord Cavendish* (1782) 4 Term Rep 741n; *Robinson v Hardcastle* (1788) 2 Bro CC 344; *Reid v Reid* (1858) 25 Beav 469. Such an appointment of the legal estate in land, made by deed, was held to be wholly void: *Brudenell v Elwes* (1801) 1 East 442. As to the use of the word 'object' see PARA 209 note 1 ante; and as to the meaning of 'stranger' see PARA 354 note 3 ante.

2 *Crozier v Crozier* (1843) 3 Dr & War 353; *Craven v Brady* (1867) LR 4 Eq 209; affd (1869) 4 Ch App 296; *Line v Hall* (1873) 43 LJ Ch 107; *Re Finch and Chew's Contract* [1903] 2 Ch 486; *Re Loughhead, Hamilton v Loughhead* [1918] 1 IR 227; but see *Re Boulton's Settlement Trust, Stewart v Boulton* [1928] Ch 703 (cited in PARA 355 note 5 ante).

3 *Alexander v Alexander* (1755) 2 Ves Sen 640; *Robinson v Hardcastle* (1788) 2 Bro CC 344; *Routledge v Dorril* (1794) 2 Ves 357; *Re Enever's Trusts, Power v Power* [1912] 1 IR 511; but see *Crompe v Barrow* (1799) 4 Ves 681; *Hewitt v Lord Dacre* (1838) 2 Keen 622.

4 *Long v Ovenden* (1881) 16 ChD 691. See also *Williamson v Farwell* (1887) 35 ChD 128; *Re Lambert, Lambert v Lambert* [1910] 1 IR 280, 1r CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(1) EXCESSIVE EXECUTION/358. Invalid exercise of power of advancement.

### **358. Invalid exercise of power of advancement.**

The exercise of a power of advancement in favour of an object may only be exercised if there is a good reason for the advance and it would be beneficial for that object<sup>1</sup>. If property is advanced for a specific purpose, a trustee is at the very least under a duty to inquire as to its application, and, if in doubt, to take steps to ensure its correct application, bearing in mind that the appointed object might be acting under undue influence<sup>2</sup>. A failure to observe these principles may result in an invalid exercise, with the appointor having to make good the resulting breach of trust<sup>3</sup>.

1 *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA.

2 *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA. As to the presumption of undue influence see also EQUITY vol 16(2) (Reissue) PARA 417 et seq.

3 *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(2) DEFECTIVE EXECUTION/359. Principles.

## **(2) DEFECTIVE EXECUTION**

### **359. Principles.**

If the execution of a power is invalid at law through failure to comply with all the requirements of the power, equity will in certain cases aid the execution<sup>1</sup>. The principle is that whenever a person who has power over an estate, whether or not a power of ownership, shows an intention to execute the power in discharge of some moral or natural obligation, equity will act on the conscience of those entitled in default of appointment and compel them to perfect the intention<sup>2</sup>. Provided there is an intention to pass the property to the persons to be benefited, an intention to do so by an exercise of the power is not essential<sup>3</sup>. However, in addition to the intention, it is essential to establish the amount of the benefit, and good consideration; and the lack of any of these suffices to prevent the court from aiding the invalid execution<sup>4</sup>.

1 Sugden on Powers (8th Edn) 532.

2 *Chapman v Gibson* (1791) 3 Bro CC 229; *Lowson v Lowson* (1791) 3 Bro CC 272.

3 *Carver v Richards* (1859) 27 Beav 488 at 495; affd (1860) 1 De GF & J 548.

4 *Garth v Townsend* (1869) LR 7 Eq 220; *Kennard v Kennard* (1872) 8 Ch App 227.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(2) DEFECTIVE EXECUTION/360. Powers within the principle.

### 360. Powers within the principle.

Equity will not aid the defective execution of statutory powers<sup>1</sup>. Thus no aid would be granted to the former statutory powers<sup>2</sup> of a tenant in tail to grant leases<sup>3</sup>, but it will be granted to all other types of power, including powers of charging<sup>4</sup> and, it seems, powers vested in husband and wife jointly<sup>5</sup>.

1 See *Peachy v Duke of Somerset* (1721) 1 Stra 447; *Griffiths v Vere* (1803) 9 Ves 127 at 134; *Keating v Sparrow* (1810) 1 Ball & B 367; *Re Brain* (1874) LR 18 Eq 389; *A-G of Victoria v Ettershank* (1875) LR 6 PC 354; *Re Bolton Estates, Russell v Meyrick* [1903] 2 Ch 461, CA.

2 See under 32 Hen 8 c 28 (1540) (repealed as obsolete by the Law of Property (Amendment) Act 1924 s 10, Sch 10). It is not possible to create new entailed interests: see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5.

3 *Earl of Darlington v Pulteney* (1775) 1 Cowp 260 at 267. Contrast *Luttrell v Olmius* (1787) cited 11 Ves 638. See also the Fines and Recoveries Act 1833; and REAL PROPERTY vol 39(2) (Reissue) PARA 129.

4 *Wilkie v Holme* (1752) 1 Dick 165; *Wade v Paget* (1784) 1 Bro CC 363.

5 But see *Martin v Mitchell* (1820) 2 Jac & W 413 at 425-426.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(2) DEFECTIVE EXECUTION/361. Defects not of the essence.

### 361. Defects not of the essence.

Equity gives relief only in respect of defects which are not of the essence of the power. Relief will not be granted so as to defeat anything material to the intention of the donor of the power<sup>1</sup>. Thus mere defects in the mode of execution will be aided<sup>2</sup>, and so will an appointment by will made under a power to appoint only by deed<sup>3</sup>. No aid will be given to an appointment by irrevocable deed made under a power to appoint only by will<sup>4</sup>, or to an appointment which would result in a fraud on the power<sup>5</sup> or aid a breach of trust<sup>6</sup>. Moreover, no aid will be given to the exercise by will of a power of revocation by deed if it is clear that a deed is of the essence, as where the original power of appointment was by will or deed and on its exercise a power to revoke by deed only was reserved<sup>7</sup>. Nor will the court aid a lease containing unusual covenants granted under a power to lease with usual covenants<sup>8</sup>, or a lease granted without consent under a power to lease with consent<sup>9</sup>, or under a power not authorising such a reservation, a sale of land reserving timber<sup>10</sup> or minerals<sup>11</sup>.

1 See *Cooper v Martin* (1867) 3 Ch App 47 at 58; *Frazer v Riversdale* [1913] 1 IR 539 at 545.

2 *Sneed v Sneed* (1747) Amb 64; *Morse v Martin* (1865) 34 Beav 500. See also *Cooper v Martin* (1867) 3 Ch App 47; *Hallett to Martin* (1883) 24 ChD 624.

3 *Tollet v Tollet* (1728) 2 P Wms 489.

4 *Reid v Shergold* (1805) 10 Ves 370 at 380; *Coffin v Cooper* (1865) 13 WR 571 at 572. See also *Re Walsh's Trusts* (1878) 1 LR Ir 320; *Chism v Lipsett* [1905] 1 IR 60, Ir CA; and PARA 267 ante.

5 *Re Kirwan's Trusts* (1883) 25 ChD 373 at 382.

6 *Mortlock v Buller* (1804) 10 Ves 292 at 317. See also *Ord v Noel* (1820) 5 Madd 438; *Bellringer v Blagrove* (1847) 1 De G & Sm 63; *Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Building Society* [1921] 2 Ch 438, CA.

7 *Re Hambro's Marriage Settlements, Hambro v Hambro* [1949] Ch 484, CA.

8 *Medwin v Sandham* (1789) 3 Swan 685. As to what are the usual covenants see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 132.

9 *Lawrenson v Butler* (1802) 1 Sch & Lef 13.

10 *Cockerell v Cholmeley* (1830) 10 B & C 564 (affd on appeal (1832) 1 Cl & F 60, HL); and see the Settled Land Act 1925 ss 49(2), 66. As to sale of land generally see SALE OF LAND. As to the effects of the Trusts of Land and Appointment of Trustees Act 1996 see REAL PROPERTY vol 39(2) (Reissue) PARA 65.

11 See *Buckley v Howell* (1861) 29 Beav 546; *Re Newell and Nevill's Contract* [1900] 1 Ch 90. Contrast *Re Gladstone, Gladstone v Gladstone* [1900] 2 Ch 101, CA; *Re Duke of Rutland's Settled Estates, Duke of Rutland v Marquis of Bristol* [1900] 2 Ch 206; *Re Chaplin and Staffordshire Potteries Waterworks Co Ltd's Contract* [1922] 2 Ch 824, CA (personal representatives). See also *Dayrell v Hoare* (1840) 12 Ad & El 356 at 369. As to the power to reserve minerals on sale see the Trustee Act 1925 ss 12(2), 68(6) (both as amended); the Settled Land Act 1925 s 50; the Law of Property Act 1925 s 101(2)(i); and the Administration of Estates Act 1925 s 39 (as amended). But see now the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and PARA 229 ante. See also EXECUTORS AND ADMINISTRATORS; MORTGAGE vol 77 (2010) PARAS 464, 465; SETTLEMENTS vol 42 (Reissue) PARA 775 et seq; TRUSTS vol 48 (2007 Reissue) PARA 1033 et seq. See further *Re Dicconson (a lunatic)* (1880) 15 ChD 316; and MENTAL HEALTH vol 30(2) (Reissue) PARA 682 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(2) DEFECTIVE EXECUTION/362. Persons who may claim relief.

### 362. Persons who may claim relief.

Equity aids the defective execution of a power only in favour of persons who stand in a particular relationship to the donee, and not the creator, of the power<sup>1</sup>. Relief is granted in the same cases as those in which the court supplied a surrender in the case of defective dispositions of copyholds<sup>2</sup>. Relief will be granted where the following persons claim:

- 12 (1) Purchasers for value. A person falls within this head only if there is consideration and an intention to purchase<sup>3</sup>, and a valid and binding contract<sup>4</sup>, such as, under a covenant on marriage, to exercise a power to jointure<sup>5</sup>. Also included as purchasers are mortgagees<sup>6</sup> and lessees<sup>7</sup>. Thus, where a power to lease arose only on the determination of an existing lease, an agreement to grant a lease entered into before the existing lease determined has been enforced by way of aiding defective execution<sup>8</sup>; and trustees during a minority have power to grant a lease which the deceased tenant for life in his lifetime contracted to grant<sup>9</sup>. Even where relief might otherwise be refused, it will be granted if after the death of a tenant for life who has granted a defective lease under a power, the remaindermen do not act and allow the lessee to expend money on the premises<sup>10</sup>. The lessee would have no claim against the lessor's estate for granting a defective lease except on express covenants<sup>11</sup>.
- 13 (2) Creditors. Equity will aid a defective execution where a testator has shown an intention to provide for his debts<sup>12</sup>. However, creditors cannot have aid for an appointment to a volunteer<sup>13</sup> and a purchaser has a better equity than creditors<sup>14</sup>.
- 14 (3) Charities<sup>15</sup>.
- 15 (4) Persons for whom the appointor is under a natural or moral obligation to provide<sup>16</sup>. Relief may be granted in favour of persons under this head unless the

appointor is under an equal obligation to provide for the persons entitled in default of appointment who are unprovided for<sup>17</sup>. Under this head, relief may be granted for the defective exercise of a power intended as a provision for a wife and child, even in favour of volunteers<sup>18</sup>, and the court will not inquire into the quantum of the provision for the wife<sup>19</sup> or child<sup>20</sup>. However, equity will not grant relief in favour of persons for whom the appointor is under no obligation to provide, such as a husband<sup>21</sup>, grandchild<sup>22</sup>, natural child or cousin<sup>23</sup>, nephew or niece<sup>24</sup> or mere volunteer, even if he is the creator of the power<sup>25</sup>.

1 Sugden on Powers (8th Edn) 537.

2 *Chapman v Gibson* (1791) 3 Bro CC 229 at 231; *Sayer v Sayer*, *Innes v Sayer* (1849) 7 Hare 377 at 387 (affd on appeal (1851) 3 Mac & G 606); but see *Jefferys v Jefferys* (1841) Cr & Ph 138.

3 *Sergeson v Sealey* (1742) 2 Atk 412. See also *Hughes v Wells* (1852) 9 Hare 749 at 769.

4 *Morgan v Milman* (1853) 3 De GM & G 24; *Re Battersea Park Acts*, *Re Arnold* (1863) 32 Beav 591; *Re Dykes' Estate* (1869) LR 7 Eq 337. An oral contract relating to land and supported only by acts of part performance would probably not suffice: *Morgan v Milman* supra at 33. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 144.

5 *Countess of Coventry v Earl of Coventry* (1724) 2 P Wms 222.

6 *Jennings v Moore* (1708) 2 Vern 609.

7 *Clark v Smith* (1842) 9 Cl & Fin 126 at 141, HL. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 144.

8 *Campbell v Leach* (1775) Amb 740; *Long v Rankin* (1822) Sugden on Powers (8th Edn) 895, HL; *Dowell v Dew* (1842) 1 Y & C Ch Cas 345 (affd (1843) 12 LJ Ch 158).

9 *Davis v Harford* (1882) 22 ChD 128. See also the Settled Land Act 1925 ss 63, 90(2); and SETTLEMENTS vol 42 (Reissue) PARA 876.

10 *Stiles v Cowper* (1748) 3 Atk 692; *A-G v Day* (1749) 1 Ves Sen 218; *Shannon v Bradstreet* (1803) 1 Sch & Lef 52; *Hope v Lord Cloncurry* (1874) IR 8 Eq 555; *Kennan v Murphy* (1879) 6 LR Ir 108 (on appeal (1880) 8 LR Ir 285, Ir CA); but see *Doe d Pulteney v Lady Cavan* (1794) 5 Term Rep 567.

11 *Blore v Sutton* (1817) 3 Mer 237; *Stamford v Omly* (undated) cited 1 Sch & Lef 65; *Vernon v Lord Egmont* (1827) 1 Bli NS 554, HL; *Lock v Furze* (1866) LR 1 CP 441, Ex Ch. For the difference between breach of a covenant implied from the word 'demise' and breach of express covenant see *Adams v Gibney* (1830) 6 Bing 656; *Line v Stephenson* (1838) 4 Bing NC 678 (affd 5 Bing NC 183); *Williams v Burrell* (1845) 1 CB 402; *Penfold v Abbott* (1862) 32 LJB 67; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 513.

12 *Chapman v Gibson* (1791) 3 Bro CC 229 at 231.

13 See Sugden on Powers (8th Edn) 540. Contrast *Holmes v Coghill* (1806) 12 Ves 206.

14 See *George v Milbanke* (1803) 9 Ves 190; *Daubeny v Cockburn* (1816) 1 Mer 626 at 638; but see *Beyfus v Lawley* [1903] AC 411, HL, where there was a covenant to exercise a power by will. See PARA 285 ante. See also the Administration of Estates Act 1925 ss 1(1), 3(2); and EXECUTORS AND ADMINISTRATORS.

15 *A-G v Burdet* (1717) 2 Vern 755; *Innes v Sayer* (1851) 3 Mac & G 606 at 620. See CHARITIES vol 8 (2010) PARA 74.

16 *Chapman v Gibson* (1791) 3 Bro CC 229 at 231.

17 *Chapman v Gibson* (1791) 3 Bro CC 229. See also *Smith v Baker* (1737) 1 Atk 385; *Braddick v Mattock* (1822) Madd & G 361; *Hume v Rundell* (1822) 6 Madd 331; *Lucena v Lucena* (1842) 5 Beav 249; *Morse v Martin* (1865) 34 Beav 500; *Re Walsh's Trusts* (1878) 1 LR Ir 320.

18 *Hervey v Hervey* (1739) 1 Atk 561 at 568.



19 See *Read and Nashe's Case* (1589) 1 Leon 147; *Wigson v Garret* (1674) T Raym 239; *Tollet v Tollet* (1728) 2 P Wms 489; *Smith v Baker* (1737) 1 Atk 385; *Marston v Gowan* (1790) 3 Bro CC 170; *Mestaer v Gillespie* (1805) 11 Ves 621 at 638; *Re Bolton Estates, Russell v Meyrick* [1903] 2 Ch 461, CA.

20 *Cotter v Layer* (1731) 2 P Wms 623; *Jones v Clough* (1751) 2 Ves Sen 365; *Chapman v Gibson* (1791) 3 Bro CC 229; *Hume v Rundell* (1822) 6 Madd 331; *Lucena v Lucena* (1842) 5 Beav 249; *Morse v Martin* (1865) 34 Beav 500; *Re Walsh's Trusts* (1878) 1 LR Ir 320; *Re Walker, MacColl v Bruce* [1908] 1 Ch 560.

21 *Moodie v Reid* (1816) 1 Madd 516. See also *Hughes v Wells* (1852) 9 Hare 749 at 769.

22 *Kettle v Townsend* (1690) 1 Salk 187; *Perry v Whitehead* (1801) 6 Ves 544.

23 *Tudor v Anson* (1754) 2 Ves Sen 582; *Bramhall v Hall* (1764) 2 Eden 220; *Blake v Blake* (1817) Beat 575.

24 *Marston v Gowan* (1790) 3 Bro CC 170.

25 See note to *Watts v Bullas* (1702) 1 P Wms 60; *Sergeson v Sealey* (1742) 2 Atk 412.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(2) DEFECTIVE EXECUTION/363. Non-execution.

### 363. Non-execution.

In general, equity will not grant relief against non-execution of a power<sup>1</sup>, as distinct from defective execution, even if it occurred through accident<sup>2</sup> or mistake<sup>3</sup>. Thus an imperfect contract will not be upheld as a valid execution of a power of sale<sup>4</sup>. But relief will be granted if the non-execution is procured by fraud, provided, it seems, the fraud is that of the person entitled in default of appointment<sup>5</sup>, and the grant of rectification is not objectionable as aiding non-execution<sup>6</sup>.

1 *Tollet v Tollet* (1728) 2 P Wms 489; *Holmes v Coghill* (1806) 12 Ves 206. See also *Tomkin v Sandys* (1718) 2 P Wms 227n; *Shannon v Bradstreet* (1803) 1 Sch & Lef 52 at 62.

2 *Buckell v Blenkhorn* (1846) 5 Hare 131 at 142.

3 *Langslow v Langslow* (1856) 21 Beav 552; *Carver v Richards* (1859) 27 Beav 488 at 496; *Re Jack, Jack v Jack* [1899] 1 Ch 374.

4 *Blore v Sutton* (1817) 3 Mer 237; *Morgan v Milman* (1853) 3 De GM & G 24; but see *Stiles v Cowper* (1748) 3 Atk 692.

5 See *Bath and Mountague's Case* (1693) 3 Ch Cas in Ch 55 at 84, 108, 122; *Vane v Fletcher* (1717) 1 P Wms 352 at 353; *Luttrell v Olmius* (1787) cited 11 Ves 638; but see *Middleton v Middleton* (1819) 1 Jac & W 94.

6 *Johnson v Bragge* [1901] 1 Ch 28.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/364. Fraudulent appointments.

## (3) FRAUD ON A POWER

### 364. Fraudulent appointments.

A person who has a limited power must exercise it in good faith for the end designed, otherwise the execution is a fraud on the power, and so void<sup>1</sup>. Fraud in this connection does not

necessarily imply any moral turpitude<sup>2</sup>. It is used to cover all cases in which the purpose of the appointment is to effect some object that is beyond the purpose and intent of the power<sup>3</sup>, whether this be selfish or, in the appointor's belief, a more beneficial mode of disposition of the property and more consonant with that which he believes to be the real wish of the donor of the power under the circumstances existing at the date of the appointment<sup>4</sup>. The true intention of the donor must be ascertained from the instrument creating it, and not otherwise, even if the appointor is also the donor<sup>5</sup>. The doctrine has no application to general powers or to hybrid powers<sup>6</sup> conferred on the appointor for his own benefit<sup>7</sup>.

Cases of frauds on a power are related to: (1) corrupt purpose<sup>8</sup>; (2) foreign purpose<sup>9</sup>; or (3) antecedent agreement to benefit non-objects<sup>10</sup>.

1 *Cloutte v Storey* [1911] 1 Ch 18, CA.

2 As to fraud as a ground for relief in equity, and equitable extensions of fraud see EQUITY vol 16(2) (Reissue) PARA 412 et seq. As to fraudulent intent as a ground for the impeaching of conveyances by creditors or subsequent purchasers see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 867; and as to fraud in connection with representations see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 755 et seq.

3 *Duke of Portland v Lady Topham* (1864) 11 HL Cas 32 at 54.

4 *Aleyn v Belchier* (1758) 1 Eden 132; *Duke of Portland v Lady Topham* (1864) 11 HL Cas 32; *Vatcher v Paull* [1915] AC 372 at 378, PC. See also *Topham v Duke of Portland* (1869) 5 Ch App 40 at 59; *Re Brook's Settlement, Brook v Brook* [1968] 3 All ER 416 at 421, [1968] 1 WLR 1661 at 1665 per Stamp J.

5 *Lee v Fernie* (1839) 1 Beav 483; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517 (affd (1864) 11 HL Cas 32); *Hutchins v Hutchins* (1876) IR 10 Eq 453.

6 As to hybrid powers see PARA 205 ante.

7 See *Re Triffitt's Settlement, Hall v Hyde* [1958] Ch 852 at 863, [1958] 2 All ER 299 at 303-304; *Dowdle v Coppel* [1987] VR 1024.

8 See PARA 365 post.

9 See PARA 366 post.

10 See PARA 367 post. For the meaning of 'non-objects' see PARA 354 note 3 ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/365. Corrupt purpose.

### **365. Corrupt purpose.**

An appointment is fraudulent and void if made with a corrupt purpose, as where the appointor's object is to benefit himself<sup>1</sup>, for example by appointing to a child of his who is seriously ill, in the hope of taking the property as the child's next of kin<sup>2</sup>. It is immaterial if the benefit is not financial but, for example, is to aid the appointor in obtaining a divorce<sup>3</sup>. The mere possibility that the appointor will derive some benefit, as where he is the father of an appointee who is a minor<sup>4</sup>, is not enough to invalidate an appointment which is valid in other respects<sup>5</sup>.

The burden, which may be shifted<sup>6</sup>, initially lies on the person seeking to avoid the appointment, and he must prove the corrupt purpose. A mere possibility of benefit, or improper motives such as anger or resentment, will not suffice<sup>7</sup>. Further, there is nothing to invalidate an appointment by the donee of the power in his own favour if he is one of the objects of the power<sup>8</sup>. A parent on executing an appointment in favour of children may not bargain with them for the purchase of other expectant shares<sup>9</sup>, although, in the absence of any intention by the appointor to benefit himself or any other non-object<sup>10</sup>, an appointment by a parent to his child is

not invalidated merely because the parent purchases the child's interest<sup>11</sup>. An appointment under a testamentary power is not invalidated merely because it is made in pursuance of a covenant, for such a covenant cannot be enforced either specifically or in damages, and so by making the agreed appointment the appointor obtains no advantage for himself by way of escaping a prospective liability<sup>12</sup>.

Trustees who have reason to believe that an appointment of the trust funds is bad are under a duty to see that the funds are not improperly distributed, and are liable for any breach of this duty<sup>13</sup>. They must not raise untenable objections<sup>14</sup>, but their duty is to watch jealously transactions between father and child, and the court will support them if their motive is honest<sup>15</sup>. On an application to the court for approval of a proposed arrangement under a trust<sup>16</sup>, if there is a fair case for an investigation to determine whether the arrangement involves a fraud on a power, and the question remains unresolved, the court must not approve the arrangement<sup>17</sup>.

1 *Lord Hinchinbroke v Seymour* (1789) 1 Bro CC 395; *Lord Sandwich's Case* (1789) cited in 4 Dr & War 55; *Palmer v Wheeler* (1811) 2 Ball & B 18; *Jackson v Jackson* (1840) 7 Cl & Fin 977, HL; *Keily v Keily* (1843) 4 Dr & War 38 at 55; *Harrison v Randall* (1851) 9 Hare 397; *Rowley v Rowley* (1854) Kay 242. See also *Gee v Gurney* (1846) 2 Coll 486; *Warde v Dixon* (1858) 28 LJ Ch 315; *Eland v Baker* (1861) 29 Beav 137 (contrast *Re Phillips, Lawrence v Huxtable* [1931] 1 Ch 347: see PARA 207 ante); *Davies v Huguenin* (1863) 1 Hem & M 730; *Carroll v Graham* (1865) 11 Jur NS 1012; *Henty v Wrey* (1882) 21 ChD 332, CA; *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169; *Re De Hoghton, De Hoghton v De Hoghton* [1896] 2 Ch 385; *Chandler v Bradley* [1897] 1 Ch 315; *Middlemas v Stevens* [1901] 1 Ch 574; *Re Cornwallis West, ex p Trustee* (1919) 88 LJB 1237; *Re Brook's Settlement, Brook v Brook* [1968] 3 All ER 416, [1968] 1 WLR 1661.

2 *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143.

3 *Cochrane v Cochrane* [1922] 2 Ch 230.

4 *Beere v Hoffmister* (1856) 23 Beav 101. See also *Butcher v Jackson* (1845) 14 Sim 444; *Hamilton v Kirwan* (1845) 2 Jo & Lat 393; *Fearon v Desbrisay* (1851) 14 Beav 635; *Domville v Lamb* (1853) 1 WR 246.

5 *Wicherley's Case* (1731) cited in Amb 234; *Cockcroft v Sutcliffe* (1856) 2 Jur NS 323; *Pares v Pares* (1863) 10 Jur NS 90; *Re Huish's Charity* (1870) LR 10 Eq 5 at 9. See also *Baldwin v Roche* (1842) 5 I Eq R 110; *Cooper v Cooper* (1869) 5 Ch App 203; *Re De Hoghton, De Hoghton v De Hoghton* [1896] 2 Ch 385; *Re Robertson's Will Trusts* [1960] 3 All ER 146n, [1960] 1 WLR 1050.

6 See *Jackson v Jackson* (1840) 7 Cl & Fin 977, HL; *Humphrey v Olver* (1859) 28 LJ Ch 406; *Topham v Duke of Portland* (1869) 5 Ch App 40 at 62, CA; *Re Wright, Hegan v Bloor* [1920] 1 Ch 108. But see *Re Crawshaw, Hore-Ruthven v Public Trustee* [1948] Ch 123 at 137, [1948] 1 All ER 107 at 115, CA.

7 *Vane v Lord Dungannon* (1804) 2 Sch & Lef 118 at 130; *M'Queen v Farquhar* (1805) 11 Ves 467; *Campbell v Home* (1842) 1 Y & C Ch Cas 664; *Pares v Pares* (1863) 10 Jur NS 90; *Topham v Duke of Portland* (1869) 5 Ch App 40 at 57, CA.

8 *Taylor v Allhusen* [1905] 1 Ch 529; *Re Penrose, Penrose v Penrose* [1933] Ch 793.

9 *Cuninghame v Anstruther* (1872) LR 2 Sc & Div 223.

10 *Re Merton's Settlement, Public Trustee v Wilson* [1953] 2 All ER 707, [1953] 1 WLR 1096 (explaining *Smith v Lord Camelford* (1795) 2 Ves 698 at 714); and consider *Langston v Blackmore* (1755) Amb 289; *Conolly v M'Dermott* (1819) Beat 601; cited in Sugden's Law of Property 513.

11 *Barron v Barron* (1838) 2 Jo Ex Ir 798. See also *Folkes v Western* (1804) 9 Ves 456; *Noel v Lord Walsingham* (1824) 2 Sim & St 99; *Brownlow v Earl of Meath* (1840) 2 Dr & Wal 674; *Askham v Barker* (1853) 17 Beav 37.

12 *Coffin v Cooper* (1865) 2 Drew & Sm 365; *Thacker v Key* (1869) LR 8 Eq 408; *Bulsteel v Plummer* (1870) 6 Ch App 160; *Palmer v Locke* (1880) 15 ChD 294, CA; *Re Bradshaw, Bradshaw v Bradshaw* [1902] 1 Ch 436; *Re Evered, Molineux v Evered* [1910] 2 Ch 147, CA; *Re Cooke, Winckley v Winterton* [1922] 1 Ch 292.

13 *Harrison v Randall* (1851) 9 Hare 397; *Mackechne v Marjoribanks* (1870) 39 LJ Ch 604. See also PARA 358 ante; and TRUSTS vol 48 (2007 Reissue) PARA 1084.

14 *Campbell v Home* (1842) 1 Y & C Ch Cas 664; *Patterson v Wooler* (1876) 34 LT 415.

15 *Whitmarsh v Robertson* (1842) 1 Y & C Ch Cas 715; *Firmin v Pulham* (1848) 2 De G & Sm 99; *King v King* (1857) 1 De G & J 663; *Re Metcalfe's Trusts* (1864) 2 De GJ & Sm 122; *Re Swan* (1864) 2 Hem & M 34.

16 *le* under the Variation of Trusts Act 1958 s 1 (as amended): see PARA 385 post; and TRUSTS vol 48 (2007 Reissue) PARA 1062 et seq.

17 *Re Wallace's Settlements* [1968] 2 All ER 209, [1968] 1 WLR 711; *Re Brook's Settlement, Brook v Brook* [1968] 3 All ER 416, [1968] 1 WLR 1661.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/366. Foreign purpose.

### 366. Foreign purpose.

An appointment is fraudulent and void if made for some purpose foreign to the power, even if that purpose is not communicated to the appointee before the appointment, and even if the appointor obtains no personal benefit from the appointment<sup>1</sup>, as where the purpose of the appointment is that the property should pass to a non-object under an assignment already executed by the appointee<sup>2</sup>, or that the appointee should use the property appointed for the benefit of a stranger to the power<sup>3</sup>, or that the appointee should be induced to reside abroad<sup>4</sup>. Further, if the donee procures the grant of the power by representing that he will not exercise it in a particular way, an appointment contrary to this representation is fraudulent<sup>5</sup>.

A condition requiring the appointee to settle the property appointed upon trusts partly for the benefit of non-objects is not necessarily fraudulent; it will be valid if in substance, and not merely upon an analysis of the effect of the appointment, the appointor's purpose was to benefit objects, as may be the case under a condition requiring the property to be settled on the objects and their children, who are non-objects<sup>6</sup>. Further, it is not fraudulent to impose a condition to be performed not by the appointee but by one of those entitled in default, with the intention that on fulfilment of the condition the appointment should be avoided<sup>7</sup>.

1 *Hay v Watkins* (1843) 3 Dr & War 339 at 343; *Weir v Chamley* (1850) 1 I Ch R 295; *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517 at 568 (affd (1864) 11 HL Cas 32); *Re Perkins, Perkins v Bagot* [1893] 1 Ch 283; *Re Cohen, Brookes v Cohen* [1911] 1 Ch 37; *Re Dick, Knight v Dick* [1953] Ch 343, [1953] 1 All ER 559, CA (explaining *Re Crawshay, Hore-Ruthven v Public Trustee* [1948] Ch 123, [1948] 1 All ER 107, CA, as to degree of moral suasion). See, however, *Hodgson v Halford* (1879) 11 ChD 959 (forfeiture on marriage with anyone not a Jew); *Wainwright v Miller* [1897] 2 Ch 255; *Re Holland, Holland v Clapton* [1914] 2 Ch 595 (condition severable); *Re Walker and Elgee's Contract* (1918) 53 ILT 22 (trusts for non-objects struck out); *Vatcher v Paull* [1915] AC 372 at 379, PC.

2 *Re Crawshay, Hore-Ruthven v Public Trustee* [1948] Ch 123, [1948] 1 All ER 107, CA.

3 *Re Marsden's Trust* (1859) 4 Drew 594. Contrast *Re Crawshay, Crawshay v Crawshay* (1890) 43 ChD 615; doubted in *Re Crawshay, Hore-Ruthven v Public Trustee* [1948] Ch 123 at 137, [1948] 1 All ER 107 at 115, CA. For the meaning of 'stranger' see PARA 354 note 3 ante.

4 *D'Abbadie v Bizoin* (1871) IR 5 Eq 205.

5 *Tharp v Tharp* [1916] 1 Ch 142; on appeal [1916] 2 Ch 205, CA (appeal settled).

6 *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193. Contrast *Re Simpson, Chadderton v Simpson* [1952] Ch 412, [1952] 1 All ER 963.

7 *Vatcher v Paull* [1915] AC 372, PC.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/367. Antecedent agreement to benefit non-objects.

### **367. Antecedent agreement to benefit non-objects.**

An appointment is fraudulent and void if it is made in furtherance of a prior agreement entered into by the appointee to benefit persons who are not objects of the power. This is so even where the agreement is in itself quite unobjectionable, for example where the appointor and appointee agree that the appointee will confer some benefit either on the appointor himself<sup>1</sup> or on some stranger to the power<sup>2</sup>. Even if the power is to appoint to one object only<sup>3</sup>, it will be held that there is fraud under this head<sup>4</sup>. There must be evidence that a bargain has been made; mere suspicion will not suffice<sup>5</sup>. But an appointor's belief in the existence of a corrupt bargain, irrespective of proof of its actual existence, may make the appointment fraudulent on the ground of improper motive<sup>6</sup>.

Where an appointment is made to an object of a power who makes a contemporaneous settlement of the fund appointed upon non-objects, the appointment is valid unless it can be shown that it was made in pursuance of a bargain<sup>7</sup>. An appointment is not vitiated merely because the appointor knows that the appointee intends to dispose of the fund in favour of a stranger to the power, although it is otherwise if it is shown that but for an agreement to make such a disposition the appointment would not have been made<sup>8</sup>. The validity of an appointment will in each case depend on the nature of the interest in the property which the appointee takes; if he is to take for his absolute benefit, the appointment is good, but if that is not the appointor's real intention, it will be void<sup>9</sup>. It has also been held that a power to appoint to children was well exercised by an appointment made with the consent of an object of the power to the children of that object<sup>10</sup>, irrespective of whether the property was in possession or in reversion<sup>11</sup>, and also where the appointment amounted to a deed of family arrangement<sup>12</sup> under which the sole object's husband, a stranger to the power, took a benefit<sup>13</sup>. Further, an appointment to an object for life with remainder (acquiesced in by him) to a non-object has been treated, at all events for certain statutory purposes<sup>14</sup>, as an appointment to the object in fee and a resettlement by him, for only by his acquiescence could the remainder take effect<sup>15</sup>.

1 *Daubeny v Cockburn* (1816) 1 Mer 626 at 644; *Jackson v Jackson* (1840) 7 Cl & Fin 977, HL; *Duggan v Duggan* (1880) 5 LR Ir 525 (affd 7 LR Ir 152). See also *Farmer v Martin* (1828) 2 Sim 502; *Arnold v Hardwick* (1835) 7 Sim 343; *Askham v Barker* (1850) 12 Beav 499; *Reid v Reid* (1858) 25 Beav 469; *Stuart v Lord Castlestuart* (1858) 8 Cl R 408.

2 *Lee v Fernie* (1839) 1 Beav 483; *Salmon v Gibbs* (1849) 3 De G & Sm 343; *Carver v Richards* (1860) 1 De GF & J 548; *Evans v Nevill* (1908) Times, 11 February, CA; *Knowles v Morgan* (1909) 54 Sol Jo 117.

3 *Re Nicholson's Settlement, Molony v Nicholson* [1939] Ch 11, [1938] 3 All ER 532, CA. The first head of fraud (see PARA 365 ante) probably applies to a power to appoint to one object only: see *Re Nicholson's Settlement, Molony v Nicholson* [1939] Ch 11 at 19, [1938] 3 All ER 532 at 535, CA.

4 Where the appointment would be fraudulent because it is made for some foreign purpose, the fact that there is only one object will save it. As to appointment for a foreign purpose see PARA 366 ante.

5 *Re Boileau's Will Trusts* [1921] WN 222.

6 *Vatcher v Paull* [1915] AC 372 at 378, PC; *Re Wright, Hegan v Bloor* [1920] 1 Ch 108 at 118-119. See also *Re Crawshaw, Hore-Ruthven v Public Trustee* [1948] Ch 123 at 143, [1948] 1 All ER 107 at 118, CA.

7 *Thompson v Simpson* (1841) 1 Dr & War 459 at 487; *Goldsmid v Goldsmid* (1842) 2 Hare 187; *Birley v Birley* (1858) 25 Beav 299; *Whitting v Whitting* (1908) 53 Sol Jo 100; *Re Boileau's Will Trusts* [1921] WN 222.

8 *Pryor v Pryor* (1864) 2 De GJ & Sm 205; *Daniel v Arkwright* (1864) 2 Hem & M 95; *Re Foote and Purdon's Estate* [1910] 1 IR 365.

9 *Langston v Blackmore* (1755) Amb 289; *Birley v Birley* (1858) 25 Beav 299; *FitzRoy v Duke of Richmond (No 2)* (1859) 27 Beav 190; *Pryor v Pryor* (1864) 2 De GJ & Sm 205; *Cooper v Cooper* (1869) LR 8 Eq 312; *Roach v Trood* (1876) 3 ChD 429, CA; *Re Turner's Settled Estates* (1884) 28 ChD 205, CA.

10 *White v St Barbe* (1813) 1 Ves & B 399; *Wright v Goff* (1856) 22 Beav 207. See also *Re Gosset's Settlement* (1854) 19 Beav 529; *Cunninghame v Anstruther* (1872) LR 2 Sc & Div 223 at 234.

11 *Re Gosset's Settlement* (1854) 19 Beav 529.

12 For the special considerations applicable to family arrangements see SETTLEMENTS vol 42 (Reissue) PARA 1005 et seq.

13 *Wright v Goff* (1856) 22 Beav 207. See also *Beddoes v Pugh* (1859) 26 Beav 407; *Skelton v Flanagan* (1867) IR 1 Eq 362; *Roach v Trood* (1876) 3 ChD 429, CA.

14 Ie those of the Finance Act 1900 s 12(2) (repealed); and the Finance Act 1907 s 16 (repealed).

15 *Colquhoun's Trustees v IRC (or Lord Advocate)* 1918 SC 887: see INHERITANCE TAXATION vol 24 (Reissue) PARA 409.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/368. Severance of appointments.

### 368. Severance of appointments.

A fraud on a power usually invalidates the whole appointment. Thus, under a joint power, an appointment is wholly bad even if only one of the joint appointors has a fraudulent intention. This is the case for all limited powers, including powers of advancement<sup>1</sup>. An appointment which is vitiated by a fraud on the power may not be severed so as to be bad only as to that part which is affected by the fraud and good as to the remainder<sup>2</sup>. This rule does not apply where:

- 16 (1) some consideration has been given which cannot be restored;
- 17 (2) the court can sever the appointor's intentions and distinguish the good from the bad, as where the fraudulent intention affects only one of two or more appointees<sup>3</sup>;
- 18 (3) the fraud affects not the raising of a fund but merely the distribution of a fund already in being, and does not affect the interest of every appointee<sup>4</sup>; or
- 19 (4) the power is a power of jointuring<sup>5</sup>, where the appointment is not invalidated merely because it is the result of a bargain between husband and wife<sup>6</sup>.

These cases must be distinguished from those in which, instead of an absolute appointment affected by fraud<sup>7</sup>, there is a valid appointment of property subject to a condition in excess of the power. Then the appointment takes effect free from the condition<sup>8</sup>, and a gift of other property subject to the condition affecting the property appointed will usually raise a case of election<sup>9</sup>.

1 *Lawrie v Bankes* (1858) 4 K & J 142.

2 *Daubeny v Cockburn* (1816) 1 Mer 626; *Farmer v Martin* (1828) 2 Sim 502; *Askham v Barker* (1850) 12 Beav 499; *Agassiz v Squire* (1854) 18 Beav 431; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517. See also *Re Chadwick's Trusts*, *Shaw v Woodward* [1939] 1 All ER 850.

3 *Harrison v Randall* (1851) 9 Hare 397; *Ranking v Barnes* (1864) 10 Jur NS 463.

4 *Lane v Page* (1754) Amb 233; *Harrison v Randall* (1851) 9 Hare 397; *Rowley v Rowley* (1854) Kay 242. See also PARA 354 ante. As to powers of charging see PARA 256 ante.

5 As to powers of jointuring see PARA 248 et seq ante; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 754; SETTLEMENTS vol 42 (Reissue) PARA 725.

6 *Lane v Page* (1754) Amb 233; *Lord Tyrconnell v Duke of Ancaster* (1754) Amb 237; *Aleyn v Belchier* (1758) 1 Eden 132; *Baldwin v Roche* (1842) 5 I Eq R 110; *Rowley v Rowley* (1854) Kay 242; *Saunders v Shafte* [1905] 1 Ch 126, CA; but see *Whelan v Palmer* (1888) 39 ChD 648.

7 As in *Re Simpson, Chadderton v Simpson* [1952] Ch 412, [1952] 1 All ER 963 (not followed in *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193: see note 9 infra).

8 See PARA 355 ante; and *McDonald v McDonald* (1875) LR 2 Sc & Div 482 at 492; *Re Perkins, Perkins v Bagot* [1893] 1 Ch 283; *Re Cohen, Brookes v Cohen* [1911] 1 Ch 37; *Re Holland, Holland v Clapton* [1914] 2 Ch 595.

9 See *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82 at 101, [1954] 3 All ER 193 at 204. As to election see PARAS 372-374 post.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/369. Effect of fraud on a power.

### 369. Effect of fraud on a power.

An appointment tainted by fraud is void<sup>1</sup>, although the persons prejudiced by it may nevertheless give effect to it<sup>2</sup>. The court will not set aside a fraudulent appointment of only part of a fund if there has been a subsequent unchallenged appointment of another part equalising the interests of the objects<sup>3</sup>. Subject to this, the appointor is free to make a further appointment<sup>4</sup>, although its validity depends on proof that the fraud no longer exists<sup>5</sup>. The burden of proof rests on the appointee, and whether the first appointment was set aside by the court or revoked by the appointor, if the second appointment is to the same person as the first, the difficulty of showing that it is not tainted by the same fraud as the first is almost insuperable<sup>6</sup>. An appointor is liable to make good to the trust estate the whole of any loss occasioned by a fraudulent appointment, and not merely any profit made by himself<sup>7</sup>.

1 *Cloutte v Storey* [1911] 1 Ch 18, CA.

2 *Skelton v Flanagan* (1867) IR 1 Eq 362; *Preston v Preston* (1869) 21 LT 346. See also *Roach v Trood* (1876) 3 ChD 429, CA; *Cloutte v Storey* [1911] 1 Ch 18 at 32, CA.

3 *Harrison v Randall* (1851) 9 Hare 397.

4 See PARA 282 ante.

5 *Farmer v Martin* (1828) 2 Sim 502; *Jackson v Jackson* (1843) Drury temp Sug 91; *Askham v Barker* (1850) 12 Beav 499; *Topham v Duke of Portland* (1869) 5 Ch App 40, CA; *Hutchins v Hutchins* (1876) IR 10 Eq 453. But see Sugden on Powers (8th Edn) 355; *Irwin v Rogers* (1848) 12 I Eq R 159. See also *Birley v Birley* (1858) 25 Beav 299; *Carver v Richards* (1859) 27 Beav 488; *Henderson v Astwood, Astwood v Cobbold, Cobbold v Astwood* [1894] AC 150 at 162, PC.

6 *Topham v Duke of Portland* (1869) 5 Ch App 40 at 61, CA, per Giffard LJ; *Hutchins v Hutchins* (1876) IR 10 Eq 453 at 457 per Chatterton V-C; *Humphrey v Olver* (1859) 5 Jur NS 946; *Re Chadwick's Trusts, Shaw v Woodward* [1939] 1 All ER 850. Contrast *Huguenin v Baseley* (1807) 14 Ves 273. As to the presumption of undue influence see EQUITY vol 16(2) (Reissue) PARA 417 et seq.

7 *Re Deane, Bridger v Deane* (1889) 42 ChD 9 at 19, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/370. Protection of purchaser.

### 370. Protection of purchaser.

A purchaser who without notice of any fraud on the power acquires a legal estate<sup>1</sup> from an appointee is not affected by the fraud<sup>2</sup>. However, the purchase must be from an appointee, and thus the issue of a marriage cannot support a fraudulent appointment to them by claiming to be purchasers for value<sup>3</sup>. A purchaser who takes merely an equitable interest may only rely upon the equitable defences open to a subsequent purchaser of an equitable interest without notice<sup>4</sup> against a prior equitable title<sup>5</sup>; or upon the limited protection given by statute, which is confined to dealings after 1925 with property appointed under equitable powers of appointment<sup>6</sup>.

Provided: (1) the appointee is not less than 25 years of age at the time of the transaction<sup>7</sup>; (2) he is a member of the class entitled in default of appointment<sup>8</sup>; and (3) the purchaser takes for money or money's worth without notice of any fraud in the appointment or of any circumstances from which the fraud might have been discovered by reasonable inquiries<sup>9</sup>, the appointment will not be void on account of that fraud as against the purchaser and those deriving title through him<sup>10</sup>. However, this protection applies only to the extent of the share to which the appointee was presumptively entitled in default of appointment immediately before the execution of the appointment, having regard to any advances in his favour, and to any provision for hotchpot: there is no statutory protection for the excess<sup>11</sup>.

1 Eg under a common law power or (before 1926) under the Statute of Uses (1535): see PARA 204 ante.

2 *M'Queen v Farquhar* (1805) 11 Ves 467; *Rhodes v Cook* (1826) 2 Sim & St 488; *Green v Pulsford* (1839) 2 Beav 70; *Hamilton v Kirwan* (1845) 2 Jo & Lat 393; *Cockcroft v Sutcliffe* (1856) 2 Jur NS 323; *Preston v Preston* (1869) 21 LT 346; *Re Huish's Charity* (1870) LR 10 Eq 5. See also EQUITY vol 16(2) (Reissue) PARA 565 et seq.

3 See *Conolly v M'Dermott* (1825) Sugden's Law of Property 513, HL; *Re Nash* (1856) 5 I Ch R 384, PC. The payment of consideration by a purchaser may turn a voluntary appointment into an appointment for value, but it cannot constitute the purchaser an object of the power: *Daubeny v Cockburn* (1816) 1 Mer 626 at 638.

4 *Palmer v Wheeler* (1811) 2 Ball & B 18; *Hall v Montague* (1830) 8 LJOS Ch 167; *Skelton v Flanagan* (1867) IR 1 Eq 362.

5 *Cloutte v Storey* [1911] 1 Ch 18, CA; *Daubeny v Cockburn* (1816) 1 Mer 626; *Askham v Barker* (1853) 17 Beav 37; *Birley v Birley* (1858) 25 Beav 299; *Warde v Dixon* (1858) 5 Jur NS 698. But see *Phillips v Phillips* (1862) 4 De GF & J 208; *Cave v Cave* (1880) 15 ChD 639. See also EQUITY vol 16(2) (Reissue) PARAS 568-569.

6 See the Law of Property Act 1925 ss 1(7), 157(4). For the protection given to purchasers in respect of the exercise of legal powers of disposition see the Law of Property Act 1925 s 104(2); Settled Land Act 1925 ss 13, 110(1), (3); Administration of Estates Act 1925 s 36(6)-(9); and EXECUTORS AND ADMINISTRATORS; MORTGAGE vol 77 (2010) PARA 468.

7 See the Law of Property Act 1925 s 157(2).

8 See *ibid* s 157(1).

9 See *ibid* s 157(2).

10 See *ibid* s 157(1), (3).

11 See *ibid* s 157(1) proviso. As to Hotchpot see WILLS vol 50 (2005 Reissue) PARA 688 et seq.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(3) FRAUD ON A POWER/371. Application to releases and revocations.

### 371. Application to releases and revocations.



The doctrine of fraud upon a power does not apply so as to invalidate a release of the power by the donee, or a covenant by him not to exercise it, even if the donee benefits by it<sup>1</sup>. Nor in general does the doctrine apply to the exercise of a power to revoke an appointment which is not merely ancillary to a power of reappointment<sup>2</sup>.

1 *Smith v Houblon* (1859) 26 Beav 482; *Re Little, Harrison v Harrison* (1889) 40 ChD 418, CA; *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227; *Re Somes, Smith v Somes* [1896] 1 Ch 250; *Re Evered, Molineux v Evered* [1910] 2 Ch 147 at 157, CA. Contrast *Re Cooke, Winckley v Winterton* [1922] 1 Ch 292, where the covenant was in effect positive; *Re Ball's Settlement* [1968] 2 All ER 438 at 440, [1968] 1 WLR 899 at 902 per Megarry J. See also the Law of Property Act 1925 ss 155, 160; and PARA 376 post. As to the necessity of a deed in such a case see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14.

2 *Shirley v Fisher* (1882) 47 LT 109; *Re Greaves, Public Trustee v Ash* [1954] Ch 434, [1954] 1 All ER 771, CA; overruling *Re Jones' Settlement, Stunt v Jones* [1915] 1 Ch 373.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(4) ELECTION/372. Application of the doctrine of election.

## (4) ELECTION

### 372. Application of the doctrine of election.

The equitable doctrine of election applies to appointments under powers<sup>1</sup>. The general rule is that where there is an appointment to a non-object and by the same instrument there is also a gift of other property to those entitled in default of appointment, the latter are put to their election<sup>2</sup>. It seems that the rule also applies if, instead of an appointment to a non-object, there is an improper delegation of the power<sup>3</sup>. There will also usually be a case for election by the appointee if the appointor exceeds a power to revoke an appointment and by the same instrument gives other property to the appointee<sup>4</sup>, or if he makes a further appointment inconsistent with an earlier appointment, and by the same instrument gives other property to the earlier appointee<sup>5</sup>. Only where the appointor purports to dispose of property which in fact he had no power to dispose of will the equitable doctrine of election apply<sup>6</sup>. There is no election where instead of an appointment to non-objects there is a mere condition in their favour, for such a condition will be rejected<sup>7</sup>, or if an appointment is void for perpetuity<sup>8</sup>. In all cases, the question whether there must be an election must be determined on all the circumstances at the date of the appointment<sup>9</sup>.

1 As to the application of the doctrine of election see EQUITY vol 16(2) (Reissue) PARA 728.

2 *Whistler v Webster* (1794) 2 Ves 367; *Blacket v Lamb* (1851) 14 Beav 482; *Fearon v Fearon* (1852) 3 L Ch R 19; *Ex p Bernard* (1857) 6 L Ch R 133; *Cooper v Cooper* (1874) LR 7 HL 53; *White v White* (1882) 22 ChD 555; *King v King* (1885) 13 LR Ir 531; *Re Wheatley, Smith v Spence* (1884) 27 ChD 606; *Re Brooksbank, Beauclerk v James* (1886) 34 ChD 160; *Re Wells' Trusts, Hardisty v Wells* (1889) 42 ChD 646; *Pitman v Crum Ewing* [1911] AC 217, HL; *Re Hargrove, Hargrove v Pain* [1915] 1 Ch 398. For the meaning of 'non-object' see PARA 354 note 3 ante.

3 *Ingram v Ingram* (1740) 2 Atk 88. However see the comments in *Re Stevens* (1912) 134 LT Jo 83. As to improper delegation see PARA 291 ante.

4 *Coutts v Acworth* (1870) LR 9 Eq 519. See also *Re Booker, Booker v Booker* (1886) 34 WR 346.

5 *Cooper v Cooper* (1870) 6 Ch App 15; on appeal (1874) LR 7 HL 53. See also *Pickersgill v Rodger* (1876) 5 ChD 163.

6 *Dashwood v Peyton* (1811) 18 Ves 27 at 41; *Langslow v Langslow* (1856) 21 Beav 552; *Box v Barrett* (1866) LR 3 Eq 244; *Lewis v Lewis* (1876) IR 11 Eq 340 at 343, Ir CA. See also *Prescott v Edmunds* (1826) 4 LJOS Ch 111; *Tomkyns v Blane* (1860) 28 Beav 422; *Re Woodleys (Minors)* (1892) 29 LR Ir 304, Ir CA.

7 See *Carver v Bowles* (1831) 2 Russ & M 301; *Blacket v Lamb* (1851) 14 Beav 482; *White v White* (1882) 22 ChD 555; *King v King* (1885) 13 LR Ir 531; *Re Neave, Neave v Neave* [1938] Ch 793, [1938] 3 All ER 220; cited in PARA 355 note 1 ante. As to excessive execution see PARA 353 et seq ante.

8 See EQUITY vol 16(2) (Reissue) PARA 728.

9 *Lady Cavan v Pulteney* (1795) 2 Ves 544 (subsequent proceedings (1797) 3 Ves 384); *Grissell v Swinhoe* (1869) LR 7 Eq 291. See also *Cooper v Cooper* (1870) 6 Ch App 15 at 21.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(4) ELECTION/373. Modifications of absolute appointments.

### 373. Modifications of absolute appointments.

Where there is an absolute appointment to an object, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the court reads the appointment as if all passages containing these attempts were swept out of it for all intents and purposes<sup>1</sup>. In such circumstances the modifications can give rise to no case for election.

1 *Carver v Bowles* (1831) 2 Russ & M 301; *Blacket v Lamb* (1851) 14 Beav 482; *Langslow v Langslow* (1856) 21 Beav 552; *Woolridge v Woolridge* (1859) John 63 at 69 per Page Wood V-C. See also *King v King* (1864) 15 I Ch R 479; *Bate v Willats* (1877) 37 LT 221. Contrast *Moriarty v Martin* (1852) 3 I Ch R 26. As to excessive execution see PARA 353 et seq ante.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/4. INVALID EXERCISE OF POWERS/(4) ELECTION/374. Clauses in the same instrument.

### 374. Clauses in the same instrument.

The doctrine of election applies as between a gift under an instrument and a claim outside that instrument and adverse to it; it does not apply as between two clauses in the same instrument<sup>1</sup>. Successive appointments in the same or different instruments raise questions of construction rather than election, especially as to whether the later appointment is intended to be in addition to or in substitution for the earlier<sup>2</sup>.

1 *Wollaston v King* (1869) LR 8 Eq 165. See also *Warren v Rudall, ex p Godfrey* (1860) 1 John & H 1; *Wallinger v Wallinger* (1869) LR 9 Eq 301. But contrast *Re Macartney, Macfarlane v Macartney* [1918] 1 Ch 300.

2 *England v Lavers* (1866) LR 3 Eq 63; *Re Keon's Estate* (1879) 3 LR Ir 228. See also *Re Tancred's Settlement, Somerville v Tancred, Re Selby, Church v Tancred* [1903] 1 Ch 715. For a similar result as between a testamentary power and a subsequent direct gift by codicil see *Grealey v Sampson* [1917] 1 IR 286, Ir CA. *Re Ashton, Ingram v Papillon* [1897] 2 Ch 574 (revsd on evidence [1898] 1 Ch 142, CA) is a case on ademption: see EQUITY vol 16(2) (Reissue) PARA 741.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(1) DISCLAIMER AND RELEASE/375. Disclaimer.

## 5. EXTINGUISHMENT AND RELEASE

### (1) DISCLAIMER AND RELEASE

#### 375. Disclaimer.

A donee of any power may disclaim it by deed and so disable himself from exercising it, whether or not it is coupled with an interest, and whenever it was created<sup>1</sup>. However, the disclaimer must be entire, not partial<sup>2</sup>, so that a trustee may not by disclaimer rid himself of part of the trusts imposed on him<sup>3</sup>. On disclaimer, the power is exercisable by any other donees or the surviving donees, unless the contrary is expressed in the instrument creating the power<sup>4</sup>.

1 Law of Property Act 1925 ss 156(1), 160 (replacing the Conveyancing Act 1882 s 6). See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14.

2 See *Re Lord and Fullerton's Contract* [1896] 1 Ch 228, CA.

3 *Re Eyre, Eyre v Eyre* (1883) 49 LT 259; *Saul v Pattinson* (1886) 55 LJ Ch 831; *Re Somes, Smith v Somes* [1896] 1 Ch 250 at 255.

4 Law of Property Act 1925 s 156(2).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(1) DISCLAIMER AND RELEASE/376. Release.

#### 376. Release.

A power coupled with a duty, or in the nature of a trust, may not be released<sup>1</sup>, whether the property concerned is realty or personalty<sup>2</sup>, unless the trust instrument contains words authorising the release<sup>3</sup>; and the trustee in bankruptcy of the donee of a special power may not release it<sup>4</sup>. Where a power of appointment is given to a donee in his capacity as the holder of an office, any release of the power by the donee binds him, but not his successors to the office<sup>5</sup>. In any other case the donee of any power may, by deed, release the power or contract not to exercise it, whether or not it is coupled with an interest, and whenever it was created<sup>6</sup>. Thus, a statutory owner of settled land may release his powers as such<sup>7</sup>, and a grantor may release a power reserved for his own benefit, whether or not he has also reserved an estate in the land<sup>8</sup>. The right to release a power applies whether the power is present or future<sup>9</sup>, or appendant or in gross<sup>10</sup>, or limited<sup>11</sup> or testamentary<sup>12</sup>, or the property real or personal<sup>13</sup>. The object of a power of appointment may expressly release the trustees from their duty to consider him<sup>14</sup>, but an attempted surrender of his beneficial interests may accelerate the interests in remainder and leave the power unreleased<sup>15</sup>.

1 *Weller v Kerr* (1866) LR 1 Sc & Div 11, HL; *Re Dunne's Trusts* (1878) 1 LR Ir 516; *Re Eyre, Eyre v Eyre* (1883) 49 LT 259; *Saul v Pattinson* (1886) 34 WR 561. Contrast *Re Mills, Mills v Lawrence* [1930] 1 Ch 654, CA; *Re Wills' Trust Deeds, Wills v Godfrey* [1964] Ch 219, [1963] 1 All ER 390; *Re Courage Group's Pension Schemes, Ryan v Imperial Brewing and Leisure Ltd* [1987] 1 All ER 528, [1987] 1 WLR 495.

2 *Chambers' Trustees v Smith* (1878) 3 App Cas 795, HL; *Thacker v Key* (1869) LR 8 Eq 408.

3 *Muir v IRC* [1966] 3 All ER 38, [1966] 1 WLR 1269, CA.

4 *Re Rose, Rose v Rose* [1904] 2 Ch 348 (on appeal [1905] 1 Ch 94, CA) where no opinion was expressed on this point. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 404.

5 *Re Wills' Trust Deeds, Wills v Godfrey* [1964] Ch 219, [1963] 1 All ER 390.

6 Law of Property Act 1925 ss 155, 160 (replacing the Conveyancing Act 1881 s 52). Contrast the Settled Land Act 1925 s 104; but see ss 24, 105 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14. For the position of a tenant for life of a Settled Land Act settlement see SETTLEMENTS vol 42 (Reissue) PARA 969. Before 1882 a power simply collateral could not be extinguished or suspended by any act, nor where it was to be exercised for the benefit of another could it be released: *Digge's Case* (1498) Sugden on Powers (8th Edn) 893; *Willis v Shorral* (1739) 1 Atk 474; *West v Berney* (1819) 1 Russ & M 431. See, however, *Hodkinson v Quinn* (1860) 1 John & H 303, where equity interfered to prevent the exercise of an equitable power.

7 *Re Craven Settled Estates* [1926] Ch 985.

8 *Bird v Christopher* (1653) Sty 389.

9 *Albany's Case* (1586) 1 Co Rep 110b.

10 *West v Berney* (1819) 1 Russ & M 431 at 435.

11 *King v Melling* (1671) 1 Vent 225; *Smith v Death* (1820) 5 Madd 371; *Bickley v Guest* (1831) 1 Russ & M 440; *Smith v Plummer* (1848) 17 LJ Ch 145; *Coffin v Cooper* (1865) 2 Drew & Sm 365. See also *Re Mills, Mills v Lawrence* [1930] 1 Ch 654, CA.

12 *Barton v Briscoe* (1822) Jac 603; *Horner v Swann* (1823) Turn & R 430; *Re Chambers* (1847) 11 I Eq R 518; *Palmer v Locke* (1880) 15 ChD 294, CA. See also *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227, CA; *Re Lyons and Carroll's Contract* [1896] 1 IR 383 at 399, Ir CA; *Chism v Lipsett* [1905] 1 IR 60 at 72, Ir CA; *Nottidge v Dering, Raban v Dering* [1910] 1 Ch 297, CA.

13 *Noel v Lord Henley, ex p Schwench and Mann* (1825) M'Cle & Yo 302, Ex Ch.

14 *Re Gulbenkian's Settlement Trusts (No 2), Stephens v Maun* [1970] Ch 408, [1969] 2 All ER 1173.

15 *Re Stone's Estate* (1869) IR 3 Eq 621; *IRC v Cookson* [1977] 2 All ER 331, [1977] 1 WLR 962, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(1) DISCLAIMER AND RELEASE/377. Mode of effecting release.

### 377. Mode of effecting release.

A release may be effected expressly<sup>1</sup> or by implication<sup>2</sup>. Thus any dealing with the property by the donee of the power which is inconsistent with the exercise of the power works a release, either wholly or in so far as it is inconsistent<sup>3</sup>; and a release may be confined in its operation to one object, precluding only an appointment to that object<sup>4</sup>, or to a limited period, when it suspends the power during that period only<sup>5</sup>. A recital may effect a release, although the whole intent of the deed must be considered<sup>6</sup>. However, on the revocation of part of an appointment the confirmation of the residue of it is no release of the power to revoke that residue<sup>7</sup>. Where there are simultaneous mutual wills made with no agreement that they are to be irrevocable<sup>8</sup>, then in the absence of any case for election, they do not prevent the survivor from exercising a power that has not been released<sup>9</sup>.

1 *Cunynghame v Thurlow* (1832) 1 Russ & M 436.

2 *Smith v Houlton* (1859) 26 Beav 482. Married women may release powers over both realty and personalty (*Re Chisholm's Settlement, Re Hemphill's Settlement, Hemphill v Hemphill* [1901] 2 Ch 82, CA); this was not affected by a restraint on anticipation (*Heath v Wickham* (1880) 5 LR Ir 285, Ir CA). See also *Re Onslow, Plowden v Gayford* (1888) 39 ChD 622; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 237. All restraints on anticipation were abolished as from 16 December 1949 by the Married Women (Restraint upon Anticipation) Act 1949. Prior to the abolition of fines and recoveries, a married woman could release a power only by fine or recovery: see PARA 378 notes 1-2 post.

3 *Smith v Death* (1820) 5 Madd 371; *Green v Green* (1845) 2 Jo & Lat 529; *Re Chambers* (1847) 11 I Eq R 518; *Hurst v Hurst* (1852) 16 Beav 372; *Davies v Huguenin* (1863) 1 Hem & M 730; *Isaac v Hughes* (1870) LR 9 Eq 191; *Re Hancock, Malcolm v Burford-Hancock* [1896] 2 Ch 173, CA; *Foakes v Jackson* [1900] 1 Ch 807; *Nottidge v Dering, Raban v Dering* [1909] 2 Ch 647 (on appeal [1910] 1 Ch 297, CA); *Re Evered, Molineux v Evered* [1910] 2 Ch 147, CA; *Lawson v Cormack's Trustees* 1940 SC 210. Contrast *Re Cooke, Winckley v Winterton* [1922] 1 Ch 292. See also *Tharp v Tharp* [1916] 1 Ch 142 (on appeal [1916] 2 Ch 205, CA); *Re Christie-Miller's Settlement Trusts, Westminster Bank Ltd v Christie-Miller* [1961] 1 All ER 855 n, [1961] 1 WLR 462; *Re Courtauld's Settlement, Courtauld v Farrer* [1965] 2 All ER 544n, [1965] 1 WLR 1385 (variation of trust); *IRC v Cookson* [1977] 2 All ER 331, [1977] 1 WLR 962, CA (surrender of life interest).

4 *Re Brown's Settlement, Public Trustee v Brown* [1939] Ch 944, [1939] 3 All ER 391.

5 Contrast Sugden on Powers (8th Edn) 51 et seq.

6 *Boyd v Petrie* (1872) 7 Ch App 385; *Re Sugden's Trusts, Sugden v Walker* [1917] 2 Ch 92, CA (partial release). See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 217 et seq.

7 *Re Lees' Trusts, Lees v Lees* [1926] WN 220.

8 *Re Oldham, Hadwen v Myles* [1925] Ch 75.

9 *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, PC.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(1) DISCLAIMER AND RELEASE/378. Release of powers of sale.

### 378. Release of powers of sale.

Fines and recoveries<sup>1</sup> destroyed powers<sup>2</sup>, although, on disentailing, a power of sale may be kept alive<sup>3</sup>. A deed of transfer of a mortgage now transfers all the powers of the mortgagee to the transferee, unless a contrary intention is expressed<sup>4</sup>; but, formerly, if the transfer contained no assignment of the power of sale in the mortgage, such a transfer might be evidence of an intent to extinguish that power<sup>5</sup>.

1 Fines and recoveries were abolished by the Fines and Recoveries Act 1833: see REAL PROPERTY vol 39(2) (Reissue) PARAS 125-126.

2 *Tomlinson v Dighton* (1712) 1 P Wms 149; *Savile v Blacket* (1722) 1 P Wms 777; *Bickley v Guest* (1831) 1 Russ & M 440. Contrast *Stewart v Marquis of Donegal* (1845) 2 Jo & Lat 636.

3 *Harrison v Round* (1852) 2 De GM & G 190; *Re Wright's Trustees and Marshall* (1884) 28 ChD 93. See also *Re Constable's Settled Estates* [1919] 1 Ch 178, CA; overruled on another point by *Parr v A-G* [1926] AC 239, HL.

4 See the Law of Property Act 1925 s 114(1)(b); and MORTGAGE vol 77 (2010) PARA 365. As to the effect of a sub-mortgage by transfer on the original mortgagee's powers see MORTGAGE vol 77 (2010) PARA 253.

5 *Curling v Shuttleworth* (1829) 6 Bing 121; *Young v Roberts* (1852) 15 Beav 558.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(2) ALIENATION AND ACQUISITION OF ESTATE/379. Alienation of estate.

## (2) ALIENATION AND ACQUISITION OF ESTATE

### 379. Alienation of estate.

In general, a power remains exercisable irrespective of the plight of the property concerned. Thus a power in gross is independent of the donee's interest and may be exercised at any time, whether during the continuance of that interest or after its determination<sup>1</sup>; but the words of the instrument creating the power may expressly or by implication restrict the exercise of the power to the duration of the estate<sup>2</sup>. Again, a power appendant may be exercised despite the alienation of the estate to which it was appended, provided the exercise does not derogate from the grant, whether it was voluntary or by operation of law<sup>3</sup>. For example, alienation does not destroy a power to appoint new trustees<sup>4</sup> or a power of appointment, whether general or special, over any part of the estate not alienated<sup>5</sup>, nor does alienation affect a power of sale<sup>6</sup>. A power of sale which authorised the creation of uses displacing the uses created by the settlement has been held to be paramount to an estate tail created by the settlement<sup>7</sup>. Acts of the person entitled in default of appointment are immaterial<sup>8</sup>.

1 *Reresby v Newland* (1723) 2 P Wms 93; *Parsons v Parsons* (1744) 9 Mod Rep 464; *Re Dunne's Trusts* (1880) 5 LR Ir 76, Ir CA. See also *Sleeman v Magrath* (1858) 8 I Ch R 195 at 207, CA; *Re Master's Settlement, Master v Master* [1911] 1 Ch 321. See PARA 283 ante.

2 Sugden on Powers (8th Edn) 79; *Haswell v Haswell* (1860) 2 De GF & J 456. But contrast *Wickham v Wing* (1865) 5 LR Ir 76, Ir CA. See also *Re Stone's Estate* (1869) IR 3 Eq 621; *Re Aylwin's Trusts* (1873) LR 16 Eq 585. See also *Re Kelly's Settlement, West v Turner* (1888) 59 LT 494.

3 *Long v Rankin* (1822) Sugden on Powers (8th Edn) 895, HL; *Warburton v Farn* (1849) 16 Sim 625; *Alexander v Mills* (1870) 6 Ch App 124; *Re Evans' Estate* [1897] 1 IR 410, Ir CA; *Earl of Lonsdale v Lowther* [1900] 2 Ch 687; *Re Lambert's Estate* [1901] 1 IR 261, Ir CA. See also *Re Constable's Settled Estates* [1919] 1 Ch 178, CA. See the Settled Land Act 1925 s 104(1), (2) (contrast ss 24, 104(3)-(12), 105); and SETTLEMENTS vol 42 (Reissue) PARAS 777-779.

4 *Hardaker v Moorhouse* (1884) 26 ChD 417; and see TRUSTS vol 48 (2007 Reissue) PARA 826.

5 *Re Sprague, Miley v Cape* (1880) 43 LT 236; *Doe d Coleman v Britain* (1818) 2 B & Ald 93; *Jones v Winwood* (1841) 10 Sim 150 (overruling *Badham v Mee* (1831) 7 Bing 695); subsequent proceedings (1832) 1 My & K 32; *Hole v Escott* (1837) 2 Keen 444 (on appeal (1838) 4 My & Cr 187).

6 *Tyrrell v Marsh* (1825) 3 Bing 31; *Walmesley v Butterworth* (1835) 4 LJ Ch 253.

7 *Roper v Halifax* (1817) 8 Taunt 845; *Hill v Pritchard* (1854) Kay 394; *Harrison v Round* (1852) 2 De GM & G 190; *Re Wright's Trustees and Marshall* (1884) 28 ChD 93. See also *Re Constable's Settled Estates* [1919] 1 Ch 178, CA; overruled on another point by *Parr v A-G* [1926] AC 239, HL.

8 *Lord v Bunn* (1843) 2 Y & C Ch Cas 98; *Chambers' Trustees v Smith* (1878) 3 App Cas 795, HL. See also *Noel v Lord Henley, ex p Schwench and Mann* (1825) M'Cle & Yo 302, Ex Ch; *Re Vizard's Trusts* (1866) 1 Ch App 588 (power of advancement); *Nottidge v Green* (1875) 33 LT 220; *Re Cooper, Cooper v Slight* (1884) 27 ChD 565. But see *Whitmarsh v Robertson* (1845) 1 Coll 570.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(2) ALIENATION AND ACQUISITION OF ESTATE/380. Effect of bankruptcy on powers.

### 380. Effect of bankruptcy on powers.

Bankruptcy does not destroy a power of consenting to a sale<sup>1</sup> or to the exercise of a power of advancement; although in this case the consent of the trustee in bankruptcy is necessary<sup>2</sup>. However, a discretionary power for trustees to pay or not to pay income to a legatee determines on the legatee's bankruptcy, and the income vests in the trustee in bankruptcy, unless the trustees have a discretion to accumulate any unpaid income or to pay it to or for the benefit of third persons<sup>3</sup>. Where the bankrupt can be excluded altogether the power is unaffected, although any property actually allocated to the bankrupt vests in his trustee in bankruptcy<sup>4</sup>; but if the bankrupt cannot be wholly excluded, the court may direct an inquiry as

to the amount proper to be applied for the other objects of the power, and give the residue to the trustee in bankruptcy<sup>5</sup>.

1 *Holdsworth v Goose* (1861) 29 Beav 111; *Eisdell v Hammersley* (1862) 31 Beav 255. See also *Lord Leigh v Lord Ashburton* (1848) 11 Beav 470; *Simpson v Bathurst*, *Shepherd v Bathurst* (1869) 5 Ch App 193; *Leclere v Beaudry* (1873) LR 5 PC 362; *Re Bedingfeld and Herring's Contract* [1893] 2 Ch 332.

2 *Re Cooper*, *Cooper v Slight* (1884) 27 ChD 565. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 404.

3 *Piercy v Roberts* (1832) 1 My & K 4; *Snowdon v Dales* (1834) 6 Sim 524. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 402. For the statutory protective trusts see the Trustee Act 1925 s 33 (as amended); and SETTLEMENTS vol 42 (Reissue) PARAS 917-918.

4 *Lord v Bunn* (1843) 2 Y & C Ch Cas 98; *Holmes v Penney* (1856) 3 K & J 90; *Re Coe's Trust* (1858) 4 K & J 199. See also *Re Coleman*, *Henry v Strong* (1888) 39 ChD 443, CA.

5 *Page v Way* (1840) 3 Beav 20; *Kearsley v Woodcock* (1843) 3 Hare 185; *Wallace v Anderson* (1853) 16 Beav 553; *Carr v Living* (1860) 28 Beav 644. But see to the contrary *Godden v Crowhurst* (1842) 10 Sim 642; *Re Landon's Trusts* (1871) 40 LJ Ch 370; *Re Ashby, ex p Wreford* [1892] 1 QB 872.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(2) ALIENATION AND ACQUISITION OF ESTATE/381. Acquisition of fee simple.

### **381. Acquisition of fee simple.**

It has been held that a power, whether appendant or in gross, which is given to the owner of a particular estate is extinguished by merger if the owner acquires the fee simple<sup>1</sup>. Nevertheless, a power may co-exist with the fee, so that where a man limited his estate to such uses as he should appoint and until appointment to the use of himself and his heirs, the fee simple continued in him, subject to being divested by an exercise of the power<sup>2</sup>. Further, even where the power was extinguished, equity would sometimes intervene to effectuate the intention of the parties by making the appointment operate out of the appointor's interest<sup>3</sup>.

1 *Cross v Hudson* (1789) 3 Bro CC 30. As to the presumption of merger see EQUITY vol 16(2) (Reissue) PARAS 764-769; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 640; MORTGAGE vol 77 (2010) PARA 673 et seq.

2 *Maundrell v Maundrell* (1805) 10 Ves 246 at 255. A similar rule applied to copyholds: *Glass v Richardson* (1852) 9 Hare 698 (on appeal 2 De GM & G 658). As to land formally copyhold see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 642; REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

3 *Cross v Hudson* (1789) 3 Bro CC 30 at 35; *Mortlock v Buller* (1804) 10 Ves 292; *Sing v Leslie* (1864) 2 Hem & M 68. See also *Grice v Shaw* (1852) 10 Hare 76 (power of charging exercised in favour of object who became entitled in fee). Contrast *Re Toppin's Estate* [1915] 1 IR 330 (merger).

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(3) SATISFACTION AND EXERCISE/382. Satisfaction of purpose.

## **(3) SATISFACTION AND EXERCISE**

### **382. Satisfaction of purpose.**

When all the purposes for which a power was originally created have ceased to exist, the power, whether it be appendant or in gross, is absolutely extinguished<sup>1</sup>. Thus a power to

advance money towards effecting the promotion of a beneficiary in the army was extinguished by the abolition of the purchase of commissions<sup>2</sup>; and a power of advancement during minority ceases when the object attains full age<sup>3</sup>.

1 *Wheate v Hall* (1809) 17 Ves 80; *Wolley v Jenkins* (1856) 23 Beav 53 (affd (1857) 5 WR 281).

2 *Re Ward's Trusts* (1872) 7 Ch App 727.

3 *Clarke v Hogg* (1871) 19 WR 617. But see *Pride v Fooks* (1840) 2 Beav 430; *Re Breed's Will* (1875) 1 ChD 226. For such powers see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 73 et seq; SETTLEMENTS vol 42 (Reissue) PARA 626; TRUSTS vol 48 (2007 Reissue) PARA 1050.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(3) SATISFACTION AND EXERCISE/383. Determination of purpose.

### 383. Determination of purpose.

In each case the purpose for which the power was created must be considered<sup>1</sup>. The question whether the power continues to exist is largely one of intention, to be determined on the construction of the instrument creating the power and with due regard to the rule against perpetuities<sup>2</sup>. Thus it seems to be a question of construction whether a power of maintenance or advancement contained in the instrument creating a power of appointment applies to shares once they have been appointed, on the principle that an appointment under a special power is to be read back into the settlement<sup>3</sup>. However, a mortgagee who has obtained a statutory title by long possession may still make title by exercising the power of sale in his mortgage<sup>4</sup>. But where under a settlement all charges have been exhausted and a general power has been exercised, the settlement is at an end<sup>5</sup> and so are all powers under it<sup>6</sup>.

1 *Trower v Knightley* (1821) 6 Madd 134; *Wood v White* (1839) 4 My & Cr 460.

2 *Lantsbery v Collier* (1856) 2 K & J 709; *Taite v Swinstead* (1859) 26 Beav 525; *Re Brown's Settlement* (1870) LR 10 Eq 349; *Peters v Lewes and East Grinstead Rly Co* (1881) 18 ChD 429, CA; *Re Cotton's Trustees and London School Board* (1882) 19 ChD 624; *Re Lord Sudeley and Baines & Co* [1894] 1 Ch 334; *Re Dyson and Fowke* [1896] 2 Ch 720; *Re Jump, Galloway v Hope* [1903] 1 Ch 129; *Talbot v Scarisbrick* [1908] 1 Ch 812; *Re Horsnail, Womersley v Horsnail* [1909] 1 Ch 631; *Re Kipping, Kipping v Kipping* [1914] 1 Ch 62, CA; *Re W and R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53, [1943] 2 All ER 716. As to the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1090 et seq.

3 *M'Mahon v Gaussen* [1896] IR 143; *Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34. Contrast *Re Winch's Settlement, Winch v Winch* [1917] 1 Ch 633. See also the doubt expressed in *Re Greenslade, Greenslade v McCowen* [1915] 1 Ch 155 at 160-161 (see PARA 291 note 19 ante).

4 *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284, CA; *Re Huddleston's Estate* [1921] 1 IR 1 at 34, Ir CA, per O'Connor MR. See also *Young v Clarey* [1948] Ch 191, [1948] 1 All ER 197.

5 Contrast *Re Dunbar-Bullar* [1923] 2 IR 143, Ir CA, where it was held that at the death of the donee of a testamentary power, the property may still be settled by reason of successive limitations in default of appointment. See also *Re Magan* [1922] 2 IR 208n.

6 *Re Gordon and Adams' Contract, Re Pritchard's Settled Estate* [1914] 1 Ch 110, CA.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(3) SATISFACTION AND EXERCISE/384. Extinguishment by exercise.

### 384. Extinguishment by exercise.



Some powers, such as powers of sale, are necessarily exhausted by a single effectual execution<sup>1</sup>. If there is an appointment of the whole of a fund in favour of one person it may operate to destroy an unexercised power to appoint the fund to another<sup>2</sup>. An appointment of the whole of a beneficiary's share out of a fund exhausts the power for that beneficiary, even though the rest of the fund later appreciates<sup>3</sup>. Other powers are not necessarily extinguished by being exercised once, but may be exercised by different appointments at different times. Thus a power fully exercised at law may not be exhausted in equity, as where a general power was exercised by way of mortgage in fee, and later the equity of redemption was appointed<sup>4</sup>. Again, a power of jointuring<sup>5</sup>, a power of appointment among children<sup>6</sup>, and a power to lend money<sup>7</sup>, may be exercised repeatedly. A power exercisable 'at any time' amounts to a power exercisable 'from time to time'<sup>8</sup>. Further, where there is a primary power, and in default of execution a secondary power, a partial exercise of the primary power does not prevent the exercise of the secondary power<sup>9</sup>. Nor, if the power is alternative, as where there is a power to sell or mortgage, does the exercise of the power to mortgage prevent a subsequent sale subject to the mortgage, or after the mortgage has been paid off<sup>10</sup>.

1 As to powers of sale see PARAS 229-231 ante.

2 *IRC v Cookson* [1977] 2 All ER 331 at 335, [1977] 1 WLR 962 at 966, CA, per Stamp LJ. See also PARA 377 ante.

3 *Re Marquess of Abergavenny's Estate Act Trusts, Marquess of Abergavenny v Ram* [1981] 2 All ER 643, [1981] 1 WLR 843.

4 *Perkins v Walker* (1682) 1 Vern 97; *Thorne v Thorne* (1683) 1 Vern 141, 182; *Ruscombe v Hare* (1828) 2 Bli NS 192. See also PARA 296 note 2 ante. Although no mortgage may now be made in fee (see MORTGAGE vol 77 (2010) PARA 187 et seq), the principle still applies.

5 *Hervey v Hervey* (1739) 1 Atk 561; *Zouch d Woolston v Woolston* (1761) 2 Burr 1136.

6 *Doe d Milborne v Milborne* (1788) 2 Term Rep 721; *Cunninghame v Anstruther* (1872) LR 2 Sc & Div 223. See also *Wilson v Piggott* (1794) 2 Ves 351 at 354; *Bristow v Warde* (1794) 2 Ves 336.

7 *Webster v Boddington* (1848) 16 Sim 177; *Versturme v Gardiner* (1853) 17 Beav 338. But see *Brown v Nisbett* (1750) 1 Cox Eq Cas 13; *Harrold v Harrold* (1861) 3 Giff 192; *Krantzche v Robinson* (1882) 11 LR Ir 500.

8 *Digge's Case* (1600) 1 Co Rep 173a.

9 *Mapleton v Mapleton* (1859) 4 Drew 515; overruling *Simpson v Paul* (1761) 2 Eden 34.

10 *Omerod v Hardman* (1801) 5 Ves 722. But see *Palk v Lord Clinton* (1805) 12 Ves 48.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(4) ORDER OF COURT/385. Effect on power.

## **(4) ORDER OF COURT**

### **385. Effect on power.**

A power is not extinguished by an order of the court<sup>1</sup>, although it may be suspended. The mere institution of an action does not affect powers<sup>2</sup>, nor does the issue of an originating summons relating to express trusts or the administration of a deceased's estate<sup>3</sup>, except so far as is necessarily involved in the particular relief sought<sup>4</sup>. But a trustee will not be disallowed his costs if he seeks the leave of the court to the exercise of his powers notwithstanding the proceedings<sup>5</sup>. Even an order for administration does not affect powers of appointment<sup>6</sup>; but

powers of management may thereafter be exercised only with leave of the court<sup>7</sup>. This is so even if the order provides that none save specified accounts and inquiries are to be prosecuted except by leave of the court<sup>8</sup>, but an executor may still pay the debts of the deceased<sup>9</sup> and give good title to a purchaser without notice of the order<sup>10</sup>. A decree for foreclosure nisi similarly does not extinguish the mortgagee's power of sale but makes it necessary to obtain leave to permit its exercise<sup>11</sup>. This is not so in the case of a mortgagee who is not a party to foreclosure proceedings by a puisne mortgagee, and has not been served with notice of them, and so is not affected by the decree<sup>12</sup>.

1 An arrangement approved by the court under the Variation of Trusts Act 1958 s 1(1) (see TRUSTS vol 48 (2007 Reissue) PARA 1062 et seq) may have the result of bringing to an end a power of appointment, as by enabling the interests of unborn persons to be bound and a special power to be released effectively so that capital can be taken out of the settlement. Contrast *Re Turner's Will Trusts*, *Bridgman v Turner* [1960] Ch 122, [1959] 2 All ER 689; *Re Courtauld's Settlement*, *Courtauld v Farrer* [1965] 2 All ER 544n, [1965] 1 WLR 1385; *Re Ball's Settlement* [1968] 2 All ER 438, [1968] 1 WLR 899. The order may control the future exercise of the power: *Re Drewe's Settlement*, *Drewe v Westminster Bank Ltd* [1966] 2 All ER 844n, [1966] 1 WLR 1518, where a power was not to be exercisable without the consent of the trustees, but the consent was not to be withheld provided they had advice from counsel of at least ten years' standing. See generally TRUSTS vol 48 (2007 Reissue) PARAS 1062-1066.

2 *Cafe v Bent* (1843) 3 Hare 245; *Neeves v Burrage* (1849) 14 QB 504; *Adams v Scott* (1859) 7 WR 213.

3 See under CPR Sch 1 RSC Ord 85 r 2: see EXECUTORS AND ADMINISTRATORS; and TRUSTS vol 48 (2007 Reissue) PARA 1057.

As from 26 April 1999, the Civil Procedure Rules (CPR) replace the Rules of the Supreme Court and the County Court Rules. Certain provisions of the RSC and CCR are saved in a modified form in CPR Schs 1 and 2 respectively. The CPR apply to proceedings issued on or after 26 April 1999, and new steps taken in existing proceedings, as prescribed: CPR 51; *Practice Direction--Transitional Arrangements* (1999) PD51.

At the date at which this volume states the law, the extent, if any, to which cases decided under RSC or CCR may be cited in relation to CPR, is unclear. It is thought that they will be persuasive where the same word or concept is used (and binding if subsequently adopted by the court), but in relation to the exercise of a discretion will be of less value in the light of the overriding objective. See further the introduction to Civil Court Practice 1999. Accordingly, cases cited in this title in amplification or explanation of the former rules will be binding over proceedings conducted under those rules, but should be viewed with caution in relation to proceedings conducted under the new regime. As to the CPR generally see CIVIL PROCEDURE.

4 See EXECUTORS AND ADMINISTRATORS; and TRUSTS vol 48 (2007 Reissue) PARA 1057.

5 *Turner v Turner* (1862) 30 Beav 414.

6 *Sillibourne v Newport* (1855) 1 K & J 602.

7 *Walker v Smalwood* (1768) Amb 676 (where the constructive trustee was held to have submitted to a sale by the court); *Widdowson v Duck* (1817) 2 Mer 494 (investment by executors); *Mitchelson v Piper* (1836) 8 Sim 64 (payment of debts by executor). See also EXECUTORS AND ADMINISTRATORS.

8 *Re Viscount Furness*, *Wilson v Kenmare* [1943] Ch 415, [1944] 1 All ER 66.

9 *Re Radcliffe*, *European Assurance Society v Radcliffe* (1878) 7 ChD 733. See also *Re Barrett*, *Whitaker v Barrett* (1889) 43 ChD 70; *Vibart v Coles* (1890) 24 QBD 364, CA. As to statute-barred debts see *Midgley v Midgley* [1893] 3 Ch 282, CA; EXECUTORS AND ADMINISTRATORS; LIMITATION PERIODS vol 68 (2008) PARA 1216.

10 *Berry v Gibbons* (1873) 8 Ch App 747; as explained in *Re Viscount Furness*, *Wilson v Kenmare* [1943] Ch 415, [1944] 1 All ER 66.

11 *Stevens v Theatres Ltd* [1903] 1 Ch 857.

12 See *Duff v Devlin* [1924] 1 IR 56; *Dolan v Murphy* [1930] IR 60.

## UPDATE

### 385 Effect on power

NOTE 3--*Practice Direction--Transitional Arrangements* (1999) PD 51 amended.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(4) ORDER OF COURT/386. Leave of the court.

### **386. Leave of the court.**

Where leave of the court is required, in most cases it will not interfere with a donee's discretion in exercising a power. The power to invest<sup>1</sup> or to appoint new trustees<sup>2</sup> contains such a discretion, and if it is exercised without leave the court may afterwards sanction its exercise<sup>3</sup>. Further, where an administration action has been concluded, subject only to liberty to apply, trustees need no leave to exercise their powers<sup>4</sup>; but payment into court puts an end to the exercise of all powers by the trustees<sup>5</sup>. If no general order for administration has been made, the powers of trustees are not affected except so far as their exercise conflicts with any order made<sup>6</sup>.

1 *Bethell v Abraham* (1873) LR 17 Eq 24.

2 *Webb v Earl of Shaftesbury, Earl of Shaftesbury v Arrowsmith* (1802) 7 Ves 480; *A-G v Clack* (1839) 1 Beav 467; *Cafe v Bent* (1843) 3 Hare 245; *Re Gadd, Eastwood v Clark* (1883) 23 ChD 134, CA. See also *Re Kensit* [1908] WN 235.

3 *Graham v Graham* (1853) 16 Beav 550; *Brown v Smith* (1878) 10 ChD 377, CA; *Re Mansel, Rhodes v Jenkins* (1885) 33 WR 727. See also *Halley v O'Brien* [1920] 1 IR 330, Ir CA.

4 *Re Mansel, Rhodes v Jenkins* (1885) 33 WR 727.

5 *Re Williams' Settlement* (1858) 4 K & J 87; *Re Coe's Trust* (1858) 4 K & J 199; *Re Tegg's Trusts* (1866) 15 WR 52; *Re Mulqueen's Trusts, ex p Mulqueen* (1881) 7 LR Ir 127; *Re Ashburnham's Trust* (1885) 54 LT 84, DC; *Re Nettlefold's Trusts* (1888) 59 LT 315; *Re Murphy's Trusts* [1900] 1 IR 145. But see *Re Landon's Trusts* (1871) 40 LJ Ch 370.

6 *Re Hall, Hall v Hall* (1885) 54 LJ Ch 527; *Re Cotter, Jennings v Nye* [1915] 1 Ch 307.

Halsbury's Laws of England/POWERS (VOLUME 36(2) (REISSUE))/5. EXTINGUISHMENT AND RELEASE/(4) ORDER OF COURT/387-400. Divorce or judicial separation.

### **387-400. Divorce or judicial separation.**

Powers contained in a marriage settlement are not extinguished by a decree absolute of divorce<sup>1</sup>; nor does a judicial separation affect the capacity of husband and wife to execute a joint power<sup>2</sup>. These powers may be affected by the exercise of the court's jurisdiction to vary such settlements on making a decree<sup>3</sup>, as where a wife's interests are extinguished by treating her as though she were dead, so that the husband alone can exercise a joint power as the notional survivor<sup>4</sup>. A power to appoint in default of children is exercisable immediately after the divorce of a childless couple, even if they remarry<sup>5</sup>.

1 *Fitzgerald v Chapman* (1875) 1 ChD 563; *Burton v Sturgeon* (1876) 2 ChD 318, CA; *Re Pilkington's Settlement, Pilkington v Wright* (1923) 129 LT 629; *Re Monro's Settlement, Monro v Hill* [1933] Ch 82. See also *Re Crawford's Settlement, Cooke v Gibson* [1905] 1 Ch 11.

2 See the Supreme Court of Judicature (Consolidation) Act 1925 s 194(1)(b)(iii) as originally enacted. Section 194(1) was substituted by the Law Reform (Married Women and Tortfeasors) Act 1935 s 5(1), Sch 1, with the

omission of this provision but with an express saving for the exercise of any joint power given to a husband and wife (s 4(2)(d)); and was subsequently repealed by the Matrimonial Causes Act 1950 s 34(1), Schedule, again with the omission of the relevant provision. That provision was then repealed by the Matrimonial Causes Act 1965 s 45, Sch 2 (both repealed by the Matrimonial Causes Act 1973 s 54(1), Sch 3). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 As to divorce and judicial separation generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

4 *Re Poole's Settlements' Trusts, Poole v Poole* [1959] 2 All ER 340, [1959] 1 WLR 651.

5 *Bond v Taylor* (1861) 2 John & H 473.